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VINDICTIVE PROSECUTION:
LIMITING THE PROSECUTOR'S DECISION TO INCREASE THE SEVERITY OF EXISTING CHARGES AGAINST A DEFENDANT

Thesis submitted to

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by

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> "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'"[1]

> "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made . . . "[2]

I. Introduction

A criminal defendant has a due process[3] right to be free from being punished for having exercised a right given him by the criminal justice system. A prosecutor is held to have deprived a defendant of that due process right if he increases the severity of existing charges with the intent to punish that defendant for (or deter other defendants from) exercising a legal right. This basic concept has not been disputed since it was first announced by the Supreme

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1 Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citing Chaffin v. Stynchombe, 412 U.S. 17, 32-33 (1973)).

2 Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967).

3 "[N]or (shall any person) be deprived of life, liberty, or property, without due process of law." U.S. CONST. Amend. V (applicable to federal prosecutions). "[N]or shall any State deprive any person of life, liberty, or property without due process of law." U.S. CONST. Amend XIV (applicable to state prosecutions). Vindictive prosecution attacks on state convictions are raised in federal courts under 28 U.S.C. § 2254 (a) (1977): "[A] district court shall entertain an application for a write of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States."

Court in Blackledge v. Perry,[4] but what has been questioned is the criteria by which to determine whether the prosecutor's intent is vindictive or within the reasonable parameters of his discretion.

The first of the above quotations describes the due process right involved, and the second illustrates the interest that causes the difficulty in reaching appropriate criteria: judicial reluctance to intrude into a prosecutor's charging discretion. The central issue in vindictive prosecution attacks on harsher charges is whether the appearance that a prosecutor has acted vindictively[5] will be sufficient to establish a due process violation, or whether the defendant must show actual vindictiveness.

The Supreme Court initially ruled that the appearance of vindictiveness, without justification by the government, would suffice to establish the due process violation, even if no actual intent to punish was proven. Some lower federal courts then developed their own interpretations of this appearance of evil standard, and in some cases required proof of actual vindictiveness. But until recently the courts did not draw a distinction between retaliation by a

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[4] 417 U.S. 21 (1974). See note 19 infra.

[5] The term "vindictive prosecution" implies that a prosecutor acted from some personal animosity towards a defendant. Animosity on the part of the prosecutor has little to do with this area. The question is whether the prosecutor retaliated (or appeared to have retaliated) because the defendant exercised a right. The term "vindictive prosecution" obviously irritated the prosecutors I interviewed, with good reason. The defense counsel I interviewed usually assumed we were talking about "selective" prosecution, which refers not to retaliation but selection of a particular defendant to prosecute under a little-used law because of race, religion or Constitutional rights.

prosecutor prior to trial and retaliation after a conviction. In 1982 the Supreme Court found that such a distinction existed, and established two standards for deciding vindictive prosecution claims.

The Supreme Court has retreated from its initial approach that placed the burden on the prosecution to justify increased charges brought after the defendant had exercised a right. As the law now stands, it makes a great deal of difference what right the defendant exercises and when the prosecutor increases charges, for that will determine whether the defendant or the prosecution has the burden of persuasion. Because the burden shifts, this paper is organized by the nature of the right exercised by the defendant. Section II discusses appeals from convictions, when the defendant is then retried on more serious charges. In that case the defendant is protected by a presumption that the prosecutor acted vindictively, and the burden is on the prosecutor to show he did not. Section III covers the opposite case, where harsher charges are filed prior to the first trial. Here the defendant now has the burden of proving that the prosecutor actually intended to retaliate against him. Section IV discusses plea bargaining, an area the Supreme Court has excepted from the due process protection against vindictiveness. Section V argues that when harsher charges are brought after a mistrial a defendant should be entitled to the same rebuttable presumption of vindictiveness that is applicable after a conviction is reversed. Section VI discusses the most recent Supreme Court case in this area, United States v. Goodwin[6] and criticizes the Court's hint that in

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6 457 U.S. 368 (1982). See text and footnotes infra, pages 17-22, 54-56.

pretrial cases a defendant faces a presumption that a prosecutor did not act vindictively. Section VII proposes several factors that should be considered in deciding pretrial vindictive prosecution claims. Section VIII compares the decision in United States v. DeMarco,[7] with the probable result if that case were decided under United States v. Goodwin, and the outcome under the analysis proposed in this paper. Section IX summarizes the current state of the law and contentions in this paper.

II. Retrials

The first Supreme Court decision on vindictiveness against a defendant dealt with retaliation by a judge, not by a prosecutor. In North Carolina v. Pearce[8] the Court held that due process protected a defendant from increased punishment by a sentencing judge because he appealed his first conviction. Pearce involved the cases of two defendants who had successfully appealed their convictions. They were retried on the original charges and each received a

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7 550 F.2d 1224 (9th Cir.), cert. denied 434 U.S. 827 (1977).

8 395 U.S. 711 (1969). Prior to North Carolina v. Pearce, the Supreme Court of New Jersey held that "procedural fairness and principles of public policy" prevented a defendant from being exposed to the death penalty after successfully appealing his first degree murder conviction where he was sentenced to life imprisonment. State v. Wolf, 216 A.2d 586 (N.J. 1966). See Bullington v. Missouri, 451 U.S. 430 (1981); Arizona v. Rumsey, 81 L. Ed. 2d 164 (1984) (double jeopardy precludes imposing death sentence when initial conviction resulted in rejection of death sentence and sentencing proceedings resemble a trial on the issue of sentencing).

longer prison sentence.[9] The Court held that defendants who successfully appealed convictions were entitled to the protection of a presumption that the harsher prison sentence was vindictively imposed:

> Due Process of Law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.[10]

The Court held in Pearce that before a judge could impose a harsher sentence on a defendant at a retrial he must identify, on the record, "objective

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9 Clifton Pearce was intitially sentenced by a North Carolina judge to a twelve to fifteen year term. At his retrial he was sentenced to eight years, but the new expiration date of his sentence was extended almost three years past his original release date. Id. at 713 n.1. Pearce was not sentenced by the same judge at his second trial. See Hardwick v. Doolittle, 558 F. 2d 292, 299 n.1 (5th Cir. 1977). The Court was not, therefore, seeking to protect a defendant only from vindictiveness by an individual judge, but rather, to protect him from "institutional" vindictiveness. But see Colten v. Kentucky, infra, note 15. The other defendant, Curtis Simpson, was initially sentenced by an Alabama judge to ten years. At his retrial he was tried on less counts, yet received a twenty-five year sentence, and was given no credit for the time he had already served. Id. at 714. See Van Alstyne, In Gideon's Wake, Harsher Penalties and the "Successful" Criminal Appellant, 74 YALE L. J. 606, 611 (1974) (proposing that harsher sentences at retrials impose an unconstitutional condition on the right to a fair trial).

10 Id. at 725 (emphasis added). Pearce is not retroactive. Michigan v. Payne, 412 U.S. 47 (1973).

information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."[11]

In Pearce the Court focused on the motivation of the sentencing judge. In Chaffin v. Stynchombe,[12] the Court declined to apply Pearce to a case where a jury imposed a harsher sentence at the defendant's retrial. It concluded that the potential for vindictiveness was negligible in a jury case if the jury was not aware of the earlier sentence.[13] Also, a jury would not have a "personal stake in the prior conviction" or an interest in discouraging appeals.[14] In

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11 395 U.S. at 726 (emphasis added). A sentencing judge is not limited to considering only a defendant's acts between the two sentencing proceedings. He may consider an intervening conviction, even if the defendant's conduct that leads to that conviction occurs prior to the first sentencing hearing. In Wasman v. United States, 468 U.S. ____, 82 L.Ed. 2d 424 (1984), the defendant was first convicted for making false statements in a passport application and received two years probation. This conviction was later reversed, and at his retrial he was again convicted. In the interim he was convicted of possessing counterfeit certificates of deposit. At his retrial on the passport offense the same judge presided and sentenced the defendant to a two year unsuspended prison term because of the intervening conviction. The Eleventh Circuit affirmed, 700 F.2d 663 (11th Cir. 1983). The Supreme Court granted certiorari to resolve a dispute between the circuits on this point. See United States v. Williams, 651 F.2d 644 (9th Cir. 1981); United States v. Markus, 603 F.2d 409 (2nd Cir. 1979). The Court was unanimous in allowing the judge to consider the intervening conviction. See also In Re Anthony M., 64 Cal. App. 3d 464 (1976). (Minor was given rehearing of juvenile court order removing him from custody of parents. At the rehearing he was placed in the California Youth Authority. The harsher disposition was justified because he had committed a burglary between the two hearings.)

12 412 U.S. 17 (1973).

13 Id. at 26.

14 Id. at 27. Chaffin was a 5-4 decision. The dissenting justices argued that Pearce should apply to jury resentencing and that the majority opinion unduly burdened a defendant's right to a jury trial. Id. at 35-46.

Colten v. Kentucky,[15] the Court also declined to extend Pearce to a case where the defendant exercised his right to a trial de novo and received a harsher sentence when he was reconvicted.[16] It concluded that the potential for vindictiveness present in Pearce was not present in de novo trials of convictions from inferior courts because a different sentencing authority would impose the second sentence, and inferior courts are designed only to be simple and speedy forums to dispose of cases, not to provide constitutional protections.[17]

In Pearce the defendants received harsher sentences after being reconvicted of the same or lesser offenses. When a defendant is retried and sentenced for more serious offenses, he is exposed to a higher maximum punishment, and the sentencing judge is dealing with different charges, factors that make Pearce inapplicable. The courts have generally decided that even if the more serious charges arise from the same incident that led to the first conviction, the defendant may be sentenced to a longer prison term.[18]

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15 407 U.S. 104 (1972).

16 Colten was convicted of disorderly conduct and fined ten dollars at his first trial. He was fined fifty dollars at his de novo trial. Id. at 107-108.

17 Id. at 116-119.

18 See, e.g. Percy v. South Dakota, 443 F.2d 1232 (8th Cir.), cert. denied 404 U.S. 886 (1971) (after his first conviction for child molesting was reversed the defendant was convicted of kidnapping, based on the same incident and sentenced to life imprisonment. Pearce held inapplicable). See also United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974) (Pearce inapplicable when new count added at retrial); United States Ex. Rel. Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), cert. denied 402 U.S. 914 (1971) (Pearce attack unsuccessful because resentenced on more severe charge after guilty plea to lesser charge withdrawn).
(Footnote Continued)

In Blackledge v. Perry[19] the Supreme Court extended the due process prohibition against vindictiveness to a case where the prosecutor substituted a felony for a misdemeanor charge after the defendant sought a trial de novo. In 1969 Jimmy Seth Perry was serving a prison term in the Odem Farm Unit of the North Carolina Department of Corrections. He was convicted in state court of misdemeanor assault on another inmate and sentenced to an additional six months confinement. North Carolina allowed an automatic trial de novo from such convictions. Perry took advantage of this opportunity, filed a request for a trial de novo, and his original conviction was nullified. At this point the prosecutor obtained a felony indictment for assault with intent to kill, based on the same incident with the other inmate.[20]

(Footnote Continued)
The Supreme Court of Alaska has interpreted its state constitution to forbid any increase in the sentence when a defendant is retried on the same charge. Shagloak v. State, 597 P.2d 142 (1979). However, a longer sentence is permissible if based on more serious charges even though they arise from the same incident. Morgan v. State, 673 P.2d 897 (Alaska App. 1983). But see, United States v. Whitley, 734 F.2d 994 (4th Cir. 1984). In Whitley the defendant pleaded guilty to one count of a four-count indictment and was sentenced to twenty years. His conviction was vacated; he was convicted of all four counts of the original indictment and sentenced by a different judge to fifty years. The Fourth Circuit held that Pearce applied because Whitley was initially sentenced for a lesser included offense of the offenses for which he was convicted at his second trial. Id. at 997 n.2. For a summary of cases applying Pearce, see Annot. 12 A.L.R. 3d 978 (Supp. 1983). Increased punishment may also result when the defendant is under a different parole eligibility after the retrial; United States v. Hawthorne, 532 F.2d 318 (3rd Cir. 1976).

19 417 U.S. 21 (1974). See Comment, Criminal Procedure: Protection of Defendants Against Prosecutorial Vindictiveness, 54 N.C. L. REV. 108 (1975) (describing decision as an absolute prohibition against harsher charges at a trial de novo).

20 417 U.S. at 22-23.

Perry pled guilty to the felony and was sentenced to a term of five to seven years. Although this sentence was to have been served concurrently with his present sentence, it actually extended his term by seventeen months.[21] Perry successfully sought habeas corpus relief from the federal district court, which was affirmed by the Fourth Circuit Court of Appeals.[22] The Supreme Court granted certiorari.[23]

The Court extended Pearce to the actions of Perry's prosecutor.[24] It considered that a prosecutor had a stake in discouraging defendants from asking for de novo trials as did a judge in discouraging appeals; both required expending additional time on the same case. A prosecutor also has the power to deter such requests by bringing felony charges in place of the original misdemeanor charges, a step the Court referred to as "upping the ante."[25]

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21 The five to seven year term did not begin until the date of his guilty plea, at which point Perry had served seventeen months of his original sentence. Id. at 24 n.2.

22 The district court, in an unreported opinion, granted the writ on the grounds that Perry's right to be free from double jeopardy had been violated. Id. at 23. The Fourth Circuit affirmed, Perry v. Blackledge, 475 F.2d 1400 (4th Cir. 1973). His petition had been denied at first by the district court for failure to exhaust state remedies. That decision was reversed because North Carolina had consistently rejected similar claims. Perry v. Blackledge, 453 F.2d 856 (4th Cir. 1971).

23 414 U.S. 908 (1973).

24 "[I]n the situation here the central figure is not the judge . . . but the prosecutor. The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the Pearce case. We conclude that the answer must be in the affirmative." 417 U.S. at 28.

25 Id. at 28-29.

As it had done in Pearce, the Court emphasized that a defendant must not be punished for exercising a right: "A person convicted of an offense is entitled to pursue his statutory right to a trial de novo without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."[26] The most significant aspect of the decision is that Perry was not required to show that the prosecutor had actually intended to punish him or discourage other defendants:

> There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the Pearce case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that 'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation . . . '[27]

The Court rejected the possible remedy of remanding for sentencing on the misdemeanor conviction.[28] This was consistent with Pearce. In both cases the

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[26] Id. at 29. A felony conviction may also place a greater burden on a defendant than a misdemeanor conviction. See The Collateral Consequences of a Criminal Conviction, 23 VAND. L. REV. 929 (1970). The cases dealing with vindictive prosecution have focused mainly on the increase in the length of the prison term caused by harsher charges.

[27] Id. While this language could be interpreted to call for an irrebutable presumption of vindictiveness, the Court allowed the prosecutor to justify bringing the harsher charges. See footnote 33 infra.

[28] Id. at 32 n.8. Justice Rehnquist dissented, arguing that a remand for resentencing in accordance with Pearce was the proper remedy. 417 U.S. at 40.

"punishment" imposed for exercising the right was set aside. In Pearce it was the harsher sentence, in Blackledge it was the harsher charge.

Perry pled guilty to the felony at his de novo trial. Although the Supreme Court had earlier decided that a plea of guilty waived a claim that a grand jury was unconstitutionally selected,[29] Perry's guilty plea did not waive the vindictiveness issue. The Court treated the due process violation in his case essentially as a jurisdictional defect, causing the state to lose the power to bring the more serious felony charge.[30]

Both Pearce and Blackledge allowed a defendant to establish a due process violation without showing any actual intent on the part of either the judge or the prosecutor to punish him. A sentencing judge after the Pearce decision is limited to the sentence imposed at the first trial[31] unless an increase can be justified by "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" which includes an intervening conviction.[32] After Blackledge a prosecutor is

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29 See Tollett v. Henderson 411 U.S. 258 (1973).

30 "[T]he right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge." 417 U.S. at 32.

31 The Court also held in Pearce that a defendant was entitled on due process and double jeopardy grounds to receive credit for time already served toward his first conviction. 395 U.S. at 718

32 395 U.S. at 726 (emphasis added). See footnote 11, supra.

bound to the initial misdemeanor charge unless he can show that it was "impossible" to proceed on the felony charge from the outset.[33]

The circuit courts took different approaches[34] in applying the Blackledge decision. But it is not surprising that they did not all agree. The Supreme Court did not distinguish between alleged retaliation by the prosecutor prior to the first trial and retaliation after an appeal, although the facts in Blackledge involved the second situation. Also, a felony was substituted for the original misdemeanor, both based on the identical incident. A prosecutor

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[33] 417 U.S. at 29-30. The Court cited Diaz v. United States, 223 U.S. 442 (1912). In that case Gabriel Diaz beat up another man and was convicted of misdemeanor assault and battery by a justice of the peace. Shortly afterward, the victim died from the beating and Diaz was then convicted of homicide. He claimed the homicide charge placed him twice in jeopardy for the same offense. The Supreme Court held that he had not been placed in jeopardy twice for the same offense, because the element of death of the injured person was not present at the first trial: "Then and not before, was it possible to put the accused in jeopardy for that offense." Id. at 443 (emphasis added). The majority did not address the fact that the Supreme Court of the Philippines doubled Diaz's sentence when it heard his appeal. Id. at 464-65; 467 (Lamar, J. dissenting). See Note, Criminal Law - Exercise of Right to Trial De Novo - A Bar to Subsequent Felony Prosecution for the Same Offense, 11 WAKE FOREST L. REV. 137 (1975); Comment, Felony Charge After Appeal of Misdemeanor Conviction: Violation of Due Process, 1975 WASH. U. L. Q. 477 (1975) (arguing that Blackledge should also apply after an appeal of a misdemeanor conviction).

[34] See Note, Recent Developments, Prosecutorial Vindictiveness: An Examination of Divergent Lower Court Standards and a Proposed Framework for Analysis, 34 VAND. L. REV. 431 (1981) (reviewing the different standards and proposing that vindictive prosecution cases can be decided under the "unconstitutional conditions" doctrine): J. KNAPP, E. MARGOLIN, & N. ARGUIMBAU, PROSECUTORIAL DISCRETION (1979). See also Note, Prosecutorial Vindictiveness in the Criminal Appellate Process: Due Process Protection after United States v. Goodwin, 81 MICH. L. REV. 194, 203-206 (1982) (This excellent article divides circuits into three categories: those with a balancing test to determine if a reasonable likelihood of vindictiveness exists, those requiring the defendant to prove actual vindictiveness, and those that presumed vindictiveness when charges increased after exercise of a right.)

has two other ways he can expose a defendant to a harsher sentence: adding charges or adding habitual offender allegations. The courts had to decide how to apply Blackledge not only when the severity of the charges was increased after the first conviction, but prior to the first trial, and increased by adding charges or habitual offender allegations. The Supreme Court has now clarified that a defendant is entitled to a presumption of vindictiveness only when he faces harsher charges after a successful appeal. The different approaches taken by the circuits between the Blackledge and Goodwin decisions are now primarily of historical interest. But when the cases that dealt with prosecutors bringing harsher charges after a successful appeal are examined they show some general agreement on how to resolve vindictive prosecution claims and one area of substantial disagreement.

To raise the appearance (or presumption) of vindictiveness the prosecutor must first "up the ante," i.e., take some action to expose the defendant to a harsher sentence after a successful appeal.[35] Even if this was done by re-charging the defendant with a more severe version of the same charge,[36] or by seeking to have a minor tried as an adult after he successfully attacked a

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35 This will still be the result after Goodwin. See Vardas v. Estelle, 715 F.2d 206, 213 (5th Cir. 1983) (Goodwin presumption not raised when first trial was on a capital offense, but his retrial only carried maximum sentence of life imprisonment).

36 See, e.g., Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979), cert. denied 447 U.S. 935 (1980) (after defendant petitioned for a de novo trial the state prosecutor recharged the same burglary under a different section of Massachusetts law that removed the possibility of a local jail sentence and required confinement in state prison).

juvenile court disposition,[37] the courts applied Blackledge. However, where the prosecutor simply asked the judge to impose a longer sentence at a de novo trial without increasing the severity of the charges, the appearance of vindictiveness was not created.[38] A prosecutor did not up the ante when he vetoed a defendant's request for a bench trial, even though this effectively avoided Pearce and exposed the defendant to a longer sentence at his retrial.[39] Also, where the defendant faced federal charges after successfully appealing his state conviction, Blackledge was held to be inapplicable.[40]

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37 See in re David B., 68 Cal. App. 3d 931 (1977) (after minor successfully attacked adjudication as a ward of the court, prosecutor petitioned to have him tried as an adult which now exposed minor to a prison sentence). But one military court has declined to apply Blackledge when criminal charges were brought after a disappointing result in a non-criminal forum. See United States v. Williams, 12 M.J. 1038 (A.C.M.R. 1982) (vindictiveness not raised when serviceman court-martialed after unsuccessful attempt to have him administratively discharged). Even after the Goodwin decision a military defendant in this situation should not be entitled to a presumption because he has not exercised an appeal right within the court-martial process.

38 In Koski v Samaha, 648 F.2d 790 (1st Cir. 1981) a demonstrator requested a de novo trial on a criminal trespass charge. The prosecutor publicly threatened to ask for a six month sentence, but at trial recommended that two months be suspended. The defendant's vindictive prosecution attack was rejected because the sentence was within the range of earlier sentences given other demonstrators. But see Comment, Prosecutorial Vindictiveness: Expanding the Scope of Protection to Increased Sentence Recommendations, 70 GEO. L. J. 1051 (1982) (arguing that prosecutor's threat should have been sufficient for the courts to find vindictiveness). The focus here is on the prosecutor, but it is important to remember that Pearce limits the sentencing judge at a retrial. The prosecutor who tries to persuade a judge to impose a harsher sentence at a retrial without introducing evidence is inviting the judge to impose an invalid sentence.

39 See Cooper v. Mitchell, 647 F.2d 437, 440 (4th Cir. 1981) (vindictiveness not raised because defendant had been tried by a jury at his first trial and whatever vindictiveness that was present was "neutralized" because the second jury did not know about the first sentence); Va. R. Crim. P. 3A:19(b).

40 See United States v. Robison, 644 F.2d 1270 (9th Cir. 1981) (no presumption
(Footnote Continued)

The courts generally agreed on how to resolve vindictiveness attacks that resulted from the prosecutor's adding an habitual offender allegation. If the prosecutor knew the defendant could be charged as an habitual offender at his first trial but filed the allegation after a successful appeal, the courts had no difficulty finding vindictiveness.[41]

But when the prosecutor knew of other charges that could be filed at the first trial yet did not bring those charges until the defendant was to be retried after a successful appeal, the courts were less consistent. The Fourth Circuit upheld a claim of vindictiveness in that situation,[42] as did one state

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of vindictiveness raised when defendant was tried on federal charges after his state conviction was reversed. The charges in that case arose from separate transactions and the defendant was not exposed to a longer sentence); United States v. De Michael, 692 F.2d, 1059, 1061-62 (7th Cir. 1982) ("[U]nder our federal system there can be simultaneous federal and state prosecutions where similar or identical offenses under the two systems of law are committed . . . (and) . . . there is nothing more than exercise of normal prosecutorial discretion involved if the prosecuting attorney is satisfied to drop one prosecution if an adequate result is obtained in the other, or decides to proceed in the second case if an inadequate result is obtained in the first."); United States v. Ng, 699 F.2d 63, 68 (2nd Cir. 1983).

41 See, e.g., James V. Rogriguez, 553 F.2d 59 (10th Cir. 1977) (habitual offender allegation added after first conviction reversed); Miracle v. Estelle, 592 F.2d 1269 (5th Cir. 1979) (defendant initially tried on robbery charge alleging one prior conviction. After reversal tried on same charge with two prior convictions alleged, which exposed him to a life sentence. Vindictiveness established and conviction reversed. At his third trial, he still was sentenced to fifty years. Miracle v. State, 604 S. W. 2d 120 (Tex. Crim. App. 1980)). Goodwin should not change this result, and two state courts have held that adding available habitual offender allegations after a mistrial raises a presumption of vindictiveness. See Twiggs v. Superior Court, 34 Cal. 3d 360, 194 Cal. Rptr. 152 (1983); Murphy v. State, 453 N. E. 2d 219 (Ind. 1983).

42 In United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976) the defendant initially pled guilty to two counts of a four-count indictment. He later had his conviction vacated, whereupon the prosecution filed a forty-one count
(Footnote Continued)

court.[43] But other courts took the position that adding separate charges at a retrial did not raise the same due process concerns present in Blackledge. But when the cases are examined, only one circuit distinguished adding charges based on separate acts from other forms of upping the ante.[44] The Fifth Circuit, in Hardwick v. Doolittle,[45] held that where separate and distinct acts are the

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indictment. Johnson was actually tried on seven additional counts and one of the original counts. The prosecution conceded it knew of the facts supporting the thirty-seven additional counts before Johnson pled at his first trial. The conviction of the original court was affirmed and the rest vacated. The prosecution could, however, retry him on the other three original counts, Id. at 1173-1175.

[43] In Cherry v. State, 414 N.E. 2d 301 (Ind.) cert. dismissed 453 U.S. 946 (1981). The prosecution dismissed two counts of a three-count indictment prior to trial. After a new trial on the remaining count was granted, the defendant was tried on three counts. No explanation was offered by the prosecution even through the court said it would accept new evidence or honest mistake to dispel the appearance of vindictiveness.

[44] See Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978) (defendant tried on burglary charge after appeal of kidnapping conviction reversed. Although both charges based on same incident they were considered separate. But the second charge carried a lesser maximum sentence than did the first); United States v. Rodriguez, 429 F. Supp. 520 (S.D.N.Y. 1977) (separate tax evasion charges filed, but defendant had only filed an unsuccessful appeal, and the separate charges were tried in a separate prosecution); United States v. Partyka, 561 F.2d 118 (separate felony indictment brought after appeal, but consolidated against the prosecutor's request, and prosecutor had legitimate reason (protection of informant) for not bringing charge from the outset.) In United States v. Mallah, 503 F.2d 971 (2nd Cir. 1974) separate heroin counts were substituted for cocaine counts at the earlier trial. The court noted that a vindictiveness argument would have "some force" if a charge had been added that arose from the same transaction. Id. at 987-988. See also United States v. Computer Sciences Corp., 511 F. Supp 1125 (E.D. Va. 1981) (after defendant was acquitted at first trial he was tried on a separate charge which did not carry a harsher penalty); United States v. Robison, 644 F.2d 1270, 1272 (9th Cir. 1981) (fact that separate charges are filed is a "key indicia" they are not vindictively motivated. But in that case the federal charges were filed after a state prosecution and the maximum sentence was not more severe).

[45] 558 F.2d 292 (5th Cir. 1977), cert. denied 434 U.S. 1049 (1978). In Hardwick the defendant was initially tried for armed robbery of three bank
(Footnote Continued)

bases for added charges at a retrial, actual vindictiveness must be established, not simply apparent vindictiveness.[46]

In United States v. Goodwin[47] the Court may have resolved which standard to apply when harsher charges are based on separate incidents when it established two standards to be used in deciding vindictive prosecution claims. In that case the Court held that where harsher charges are brought after a successful appeal the defendant is entitled to a presumption of vindictiveness.

In 1976 Learly Goodwin was stopped for speeding on the Baltimore-Washington Parkway by a United States Park Policeman. He left his car, showed his drivers license and registration. The policeman noticed a plastic bag under the armrest and told Goodwin to get into the car and raise the armrest. Goodwin got back in the car but suddenly accelerated, "fishtailed," and hit the officer who was thrown on the back of the car and then to the ground. A high speed chase

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(Footnote Continued)
employees and assault on three policemen during a shoot out after the robbery. His conviction was declared void because he was tried before a petition for removal of his state trial to federal court was answered. See 28 U.S.C.A. § 1443 (1973); 28 U.S.C.A. § 1446(e)(Supp. 1983). He was then indicted and tried on a superceding indictment that contained an additional charge of armed robbery of a bank customer and a charge of assaulting a probation officer he used as a shield during the shoot out, both arising from the same bank robbery. The Fifth Circuit held that these two charges "were different and distinct activities and thus were the subjects of discretionary prosecutorial decisions which up to then had not been made." 558 F.2d at 302. Because they were not "harsher variations" of an original charge, the court required that it be established that a prosecutor's "motives are in fact vindictive." Id.

46 The case was remanded to the district count to allow the prosecution to show the reasons for bringing the additional counts. Id. at 302-03.

47 457 U.S. 368 (1982) (affirmed after remand in United States v. Goodwin, 676 F.2d 14 (4th Cir.), cert. denied 457 U.S. 1125 (1982)).

followed, but Goodwin escaped capture. He was later arrested and appeared before a federal magistrate. A trial date on misdemeanor and petty offenses of speeding, reckless driving, failing to give aid, fleeing from a police officer, and assault on a police officer was set for April 30, 1976. Goodwin did not appear for trial.[48]

Three years later, in May of 1979, Goodwin was returned to Maryland after being convicted in Virginia on drug and assault charges and receiving an eighteen-year prison sentence.[49] Plea negotiations failed[50] because Goodwin insisted on pleading not guilty and he demanded a jury trial. His case was then transferred to the district court.[51] The Assistant United States Attorney assigned at that point obtained a four-count indictment that substituted felony assault on a federal officer in place of the original misdemeanor charge of

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48 Id. at 370.

49 Before seeking the indictment that was to generate the vindictiveness claim, the Assistant United States Attorney contacted the Virginia authorities and was told that Goodwin had received fifteen years for possession of heroin and three years for attempting to shoot the police officer who was arresting him for possession of heroin. He was also told that Goodwin was believed to be a heroin dealer, had falsely claimed to be in Atlanta when the incident occurred, and had failed to appear for his first trial on the Virginia charges. Affidavit of Mr. Edward M. Norton, Jr., United States v. Goodwin 457 U.S. 368 (1982) (available 1 November 1983 on LEXIS, Genfed Library, Sup. Ct. Briefs).

50 The attorney assigned to Goodwin's case after he was returned to Maryland was on a two-week assignment to try petty offenses and misdemeanors and did not have authority to seek felony indictments. 457 U.S. at 370-71.

51 At the time magistrates could not conduct jury trials. Id. at 371, n.1; 18 U.S.C.A. § 3401(b) (Supp. 1983). The present version of 18 U.S.C.A. § 3401(b) allows magistrates to conduct jury trials but the defendant may still elect to be tried before a district judge.

assault on a police officer.[52] At his trial Goodwin unsuccessfully moved for dismissal of that felony count on the ground it was the result of prosecutorial vindictiveness.[53]

Goodwin appealed to the Fourth Circuit, which reversed the district court.[54] The Fourth Circuit viewed the facts as creating a "genuine risk of retaliation" by the prosecutor.[55] This required the government to show that the harsher charges "could not have been brought before the defendant exercised his rights."[56] The information about Goodwin's criminal record had not been in the hands of the first prosecutor when his case was before the magistrate. However, the Fourth Circuit considered that it was available prior to his request for a jury trial.[57] For this reason it rejected the government's argument that because the second prosecutor had new evidence to support the felony indictment,

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52 The original charges exposed Goodwin to twenty-eight months in prison. 457 U.S. 387, n.1 (Brennan, J. concurring) The indictment exposed him to a fifteen year sentence. Id. at 388, n.3.

53 The district court opinion is not reported. the motion was filed after Goodwin was found guilty. The judge excused the requirement that motions be filed prior to pleas because Goodwin's attorney inadvertently delayed filing the motion. United States v. Goodwin, No. HM-79-1298 (D. Md. Nov. 7, 1979) (available 1 November 1983 on LEXIS, Genfed Library, Sup. Ct. Briefs). See also Fed. R. Crim. P. 12(b),(f).

54 United States v. Goodwin, 637 F.2d 250 (4th Cir. 1981).

55 Id. at 253.

56 Id. at 255 (emphasis added).

57 Id.

any appearance of vindictiveness was dispelled. The Supreme Court granted certiorari.[58]

The majority opinion acknowledged that Blackledge created a presumption of vindictiveness in retrial cases:

> [T]he Court emphasized in Blackledge that it did not matter that no evidence was present that the prosecutor had acted in bad faith or with malice in seeking the felony indictment. As in Blackledge, the Court held that the likelihood of vindictiveness justified a presumption that would free defendants of apprehension of such a retaliatory motivation on the part of the prosecutor.[59]

This presumption is justified by an "institutional bias" against retrial of cases and by an implicit assumption that by the time the first trial is completed the prosecutor will have completed his investigation and evaluation of his case.[60]

By establishing a standard of presumed vindictiveness in retrial cases the Supreme Court has overruled by implication the Fifth Circuit decisions that called for a "balancing" of interests to determine if presumed or actual

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58 United States v. Goodwin 454 U.S. 1079 (1981).

59 457 U.S. at 376. The Court was unanimous on this point. The concurring and dissenting opinions only addressed the standard to apply when the "ante is upped" after a right is exercised prior to trial.

60 Id. at 376-77,381.

vindictiveness would be the test.[61] In a retrial case the issues are now whether the prosecution has upped the ante, and if so, has the presumption been adequately rebutted. After Goodwin a defendant raises a substantial attack on harsher charges by bringing a pretrial motion to dismiss them alleging the prosecution has upped the ante following his successful appeal or request for a trial de novo. Upping the ante may take the form of substituting a felony for a misdemeanor, adding an habitual offender allegation or adding charges. But if the changes will not increase the potential sentence, the threshold requirement that the ante be upped will not be established and no presumption of vindictiveness is raised.[62] Also, if federal charges are brought after a state conviction

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61 The Fifth Circuit has held subsequent to Goodwin that when the prosecutor increases the severity of charges after a successful appeal, no presumption is created "[i]f any objective event or combination of events . . . should indicate to a reasonable minded defendant that the prosecutor's decision to increase the severity of charges was motivated by some purpose other than a vindictive desire to deter or punish appeals . . ." United States v. Krezdorn, 718 F.2d 1360, 1365 (5th Cir. 1983), cert. denied 104 S. Ct. 1416 (1984). In Krezdorn the defendant was initially charged with five counts of forging immigration documents in violation of 18 U.S.C. § 1426(a). At trial evidence of thirty-two other forgeries was introduced and he was convicted of four counts. His conviction was reversed on the grounds that admitting evidence of the uncharged forgeries was error. United States v. Krezdorn, 639 F.2d 1327 (1981). The prosecutor then charged him with conspiring to forge immigration documents and the four forgeries. The district court dismissed the conspiracy count for vindictiveness which was affirmed by a panel of the Fifth Circuit relying on Goodwin. United States v. Krezdorn, 693 F.2d 1221 (5th Cir. 1982). On rehearing the case en banc the Fifth Circuit reversed. 718 F.2d at 1365. The en banc decision, as written, cannot be squared with Goodwin. The most reasonable interpretation is that the Fifth Circuit views the Goodwin presumption as a method to establish actual motivation, and since the trial court made a finding that no actual vindictiveness existed, dismissal was unwarranted. But this must be implied from the decision and is directly contrary to Blackledge, because actual motivation is irrelevant in retrial cases.

62 See Vardas v. Estelle, 715 F.2d 206, 213 (5th Cir. 1983) (Goodwin presumption not raised when first trial was for capital offense, but retrial carried maximum sentence of life imprisonment).

a defendant will not be successful in claiming vindictiveness even if the federal charge is based on the same transaction.[63]

Once the prosecution has upped the ante the Goodwin presumption can be rebutted, but only by objective evidence of legitimate and non-vindictive reasons for increasing the severity of the charges. This means something other than a statement from the prosecutor that his motives were pure. For example, a claim that the prosecutor was just "reforming" an indictment when he filed harsher charges was held, prior to Goodwin to be insufficiently objective.[64] Also, a claim that a recidivist allegation was brought for the first time at a defendant's retrial because state law made filing those allegations mandatory was held to be insufficient when the allegation was known to the prosecution and could have been filed prior to the first trial.[65] Also, even though a defendant will be eligible for parole at the same time under the harsher charges does not affect the fact that the ante has been upped where he was tried on charges that on their face carried a harsher sentence.[66]

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63 See United States v. Ng, 699 F.2d 63, 68 (2d Cir. 1983) (vindictiveness attack not available when harsher charges brought at separate trial by separate sovereign); United States v. DeMichael, 692 F.2d 1059, 1061-62 (7th Cir. 1983).

64 See Ronk v. State 578 S.W. 2d 120 (Tex. Crim. App. 1979) (defendant's conviction of injury to a child reversed, then prosecutor charged him with murdering the child. "Reforming" argument rejected because prosecutor knew child was dead before defendant's first trial).

65 James v. Rodriquez, supra note 41 at 62.

66 Hardwick v. Doolittle, supra note 45 at 300 (parole will be affected by the number of convictions: potential punishment in that case was doubled to two consecutive life sentences).

The strongest and most objective rebuttal evidence is a showing that prosecutor could not have proceeded on the harsher charge at the first trial. The example noted by the Supreme Court in Blackledge was a case where the victim of an assault died after the first trial, which established the element for homicide.[67] But that extreme example is unlikely to occur. THe more likely situation will be where the prosecution discovers new evidence about other crimes committed by the defendant. Prior to the Goodwin decision this fact was held to rebut any presumption at vindictiveness. For example, where a continuing investigation developed more evidence against a defendant,[68] a witness changes his testimony,[69] or when the prosecutor no longer needs to protect the identity of an informant on a separate incident,[70] prosecutors have been allowed to increase the severity of charges. Those decisions have not been

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67 See note 33 supra.

68 United States v. Nell, 570 F.2d 1251 (5th Cir. 1978) (after first indictment filed, investigation continued. Thirteen new counts filed after conviction reversed were based on that investigation).

69 See United States v. Thomas, 617 F.2d 436,438 (5th Cir. 1980), cert. denied 450 U.S. 927 (1981) (additional counts developed from continuing grand jury investigation and witness changed testimony which had favored defendant).

70 See United States v. Partyka, 561 F.2d 118, 124 (8th Cir. 1977) (reversal of misdemeanor conviction enabled prosecutor to expose identity of informant, and a separate felony count was substituted at the retrial of the misdemeanor. The defendant's claim that this was vindictive was rejected: "[W]e do not read (Blackledge) as taking away from prosecutors their traditional and proper discretion in deciding which of multiple possible charges against a defendant are to be prosecuted or whether they are all to be prosecuted at the same time.").

affected by the Supreme Court. It is important to bear in mind, however, that the burden to rebut the presumption is on the prosecution.[71]

Can a distinction be made (and no presumption created) when the added charges are based on separate actions by the defendant, even though arising from the transaction that led to the first charges? The prosecution cannot deny knowledge of the facts supporting the added charge if they occurred during the same event that led to the first trial. Once on notice of these facts, if charges are not filed, the prosecutor has made a discretionary determination not to bring them to trial.[72] The rationale for the retrial presumption of vindictiveness in the Goodwin decision is that by the end of the first trial a prosecutor will have made that discretionary decision:

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71 "The (retrial) presumption again could be overcome by objective evidence justifying the prosecutor's action." 457 U.S. at 376 n.8. It has been suggested that the prosecutor can only rebut the presumption if he subsequently discovered new evidence about the defendant which would include evidence that could have been discovered with due diligence prior to the first trial. See 81 MICH. L. REV. at 215-217. Limiting rebuttal to new evidence solely about the defendant is not supported by an analogy to Pearce, for the Supreme Court has expanded the scope of evidence that would justify a harsher sentence under Pearce to include the intervening event of a conviction on unrelated charges. See Wasman v. United States, supra note 11. Also, an appellate decision after the first trial may now enable the prosecution to introduce evidence that it was unable to introduce at the first trial. Rebuttal evidence should also include intervening developments that justify increasing the severity of the charges. The point that the prosecution must also show it could not have discovered the evidence by exercising due diligence is sound, for it precludes raising what is a subjective argument: that the initial prosecution was affected by a mistake or oversight. The reader should compare the Michigan proposal with the shallow treatment of the issue in Note, Evaluating Prosecutorial Vindictiveness Claims in Non-Plea Bargained Cases, 55 SO. CAL. L. REV. 1133 (1982).

72 Contra, Hardwick v. Doolittle, supra, note 45.

> [O]nce a trial begins--and certainly by the time a conviction has been obtained--it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.[73]

When a prosecutor attempts to justify adding separate charges by pointing out that the defendant has not been tried on the added charges, or that no decision to prosecute them was made prior to the first trial, he is essentially saying that he has changed his mind, and the court should let him do it because he has prosecutorial discretion. But reliance by a prosecutor on his discretion misses the point. The due process protection against vindictiveness is already a limitation on that discretion. The concerns about a prosecutor retaliating or generating apprehension that a defendant who is foolhardy enough to appeal will be punished are not overcome by the questionable distinction between separate acts within a transaction. There may be a legitimate reason for adding those charges,[74] but the fact that they are based on separate acts within a transaction, if known to the prosecution should not rebut the presumption.[75]

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73 Id. at 381 (emphasis added).

74 The Fifth Circuit has suggested that "mistake or oversight in the initial action, a different approach to prosecutorial duty by a successor prosecutor, or public demand for prosecution on the additional crimes" would "negate vindictiveness." Hardwick v. Doolittle, supra note 45 at 301. See also, Cherry v. State, 414 N.E. 2d 301 (Ind. 1981) (court should accept showing of honest mistake as well as new evidence to rebut appearance of vindictiveness.) "Mistake" or "different approach" should not be acceptable rebuttal evidence because they are subjective characterizations of earlier actions by a prosecutor who has increased the severity of charges after an appeal.

75 See Thigpen v. Roberts, 468 U.S. ____, 82 L. Ed. 2d 23 (1984). In Thigpen
(Footnote Continued)

The same conclusion should be reached if the prosecution adds separate and unrelated charges to those being retried.[76] If these additional charges were known at the time of the first conviction, the prosecution had the opportunity to consider them in determining the extent to which the defendant should be prosecuted. Even though this change in the charging decision involves separate crimes, the perception by the defendant facing retrial and other defendants is the same: that the prosecutor is retaliating for this successful appeal, and will retaliate against other defendants. An objection can be raised that this view is tantamount to saying that due process requires the prosecution to bring

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(Footnote Continued)
the defendant was initially convicted of reckless driving, driving while his license was revoked, driving on the wrong side of the road, and driving while intoxicated. He appealed for a trial de novo of these misdemeanor convictions. He was then indicted and convicted of manslaughter arising from the death of a passenger in the truck he hit with his car. 82 L. Ed 2d at 27. The district court granted his habeas corpus petition on due process and double jeopardy grounds and the Fifth Circuit affirmed, only on double jeopardy grounds. In affirming, the Supreme Court relied on Blackledge. It refused to accept the argument that since manslaughter involves separate elements from the traffic offenses, Blackledge was inapplicable:

> In both courts below, the State attempted to distinguish Blackledge on the ground that the misdemeanor and felony at issue in that case shared specific elements in a way that traffic violations and manslaughter do not. . . . Even if the state is correct that the offenses charged in Blackledge had more in common than those charged here, this parsing of the statue misses the point. Blackledge engaged in no such analysis. It noted merely that the 'indictment covered the same conduct for which Perry had been tried and convicted.'

82 L. Ed. 2d at 29 (citations omitted).

[76] See Note, A "Realistic Likelihood of Vindictiveness": Due Process Limitations on Prosecutorial Charging Discretion, 1981 U. ILL. L. REV. 693, 719-20 (addition of charges has a chilling effect on exercise of rights, and courts should not assume prosecution did not know of them prior to first trial).

all known charges against a defendant from the outset,[77] on pain of losing those not filed should the defendant successfully appeal. But the issue of vindictiveness is not raised simply because the prosecution brought the defendant to trial for separate crimes, but that it did so in a manner that ups the ante against a particular defendant: adding them to the original charges being retried. The same realistic likelihood of vindictiveness[78] that is present when a prosecutor substitutes a felony for a misdemeanor therefore exists when a prosecutor adds[79] previously known charges to those being retried, and a defendant should be entitled to a presumption of vindictiveness.

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77 Although not required to do so by due process, a prosecutor may be required by statute or regulation to bring all known charges. See, e.g., GA CODE § 16-1-7 (1977) (formerly § 26-506); Curry v. State, 281 S.E. 2d 604 (Ga. 1981) (all charges must be tried at a single trial, if known to the prosecution). The Armed Forces has a similar policy. See R.C.M. 306(b) Manual for Courts Martial, United States (1984).

78 United States v. Goodwin, 457 U.S. at 384 quoting Blackledge v. Perry, 417 U.S. at 27.

79 Unless barred by a statute of limitations, the charges may be tried at a separate proceeding. Also, the prosecution may be unable to join them to the original charges. See, e.g., F. R. Crim. P. 8(a): "Two or more offenses may be charged in the same indictment . . . if the offenses . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." The trial judge also has the discretion to sever charges if their joinder prejudices a defendant's defense at trial. See, e.g., F. R. Crim. P. 14. The defendant must show actual vindictiveness if he is tried at a separate trial on unrelated charges. The Department of Justice's dual prosecution policy--that it may not prosecute a defendant who is already serving a prison sentence--can lead to prosecution after a defendant successfully appeals that conviction. It has been held that following that policy and prosecuting a defendant on separate offenses after his first conviction was reversed and resulted in an acquittal does not raise any inference of vindictiveness. United States v. Spence, 719 F.2d 358, 364 (11th Cir. 1983) (The court "doubted" that a presumption applied where a defendant was prosecuted on tax violations after his conviction for drug offenses was reversed and he was acquitted. But because tax offenses were based on new evidence the court went on to hold that no vindictiveness, presumed or actual, was shown).

Discovery of new evidence about a defendant will clearly rebut any presumption of vindictiveness. But "new evidence" should not be limited solely to evidence about the defendant's conduct. In Pearce the Supreme Court did say that a sentencing judge can only base a more severe sentence on information about a defendant's conduct after the first sentencing hearing. But it has recently held that a sentencing judge can consider an intervening conviction that was not based on conduct after the first sentencing. A prosecutor should be allowed to rebut by showing a new development that would reasonably lead to a new charging decision, even though it does not specifically involve the defendant.

Once a prosecutor ups the ante after a successful appeal, the primary issue is whether he can meet his burden to rebut the presumption of vindictiveness that arises. But when he increases the severity of existing charges prior to the first trial, a different standard is applied. It is in this area that the Supreme Court in Goodwin shifted the burden to the defendant. When the ante is upped prior to trial, the defendant now has the burden of proving that the prosecutor was actually vindictive when he increased the severity of the charges after the defendant successfully exercised a constitutional or statutory right.

III. Pretrial

In Blackledge the Supreme Court did not limit the due process protection against retaliation solely to cases where the defendant's conviction is set aside. In fact, the Court emphasized that the Double Jeopardy Clause was not

the basis for their decision. The potential for retaliation by a prosecutor prior to trial also exists, and was recognized by the lower courts. A defendant may exercise a right that makes the prosecutor's job harder and the prosecutor has the power to punish a defendant (and deter other defendants) by increasing his exposure to prison. After Blackledge and before Goodwin lower courts generally did not distinguish between alleged retaliation after an appeal from a conviction and retaliation after exercise of a pretrial right.[80]

For example, the Ninth Circuit applied a presumption of vindictiveness test when the retaliation (a two-count felony indictment) occurred after the defendant refused to plead guilty to a misdemeanor or consent to have his case heard by a federal magistrate.[81] The Fifth Circuit also applied Blackledge in a case where an additional count was added to an existing indictment after the defendant refused to plead guilty.[82]

The Sixth Circuit applied Blackledge to a case where two defendants successfully obtained their release on bail over the objection of the

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80 See United States v. Chagra, 669 F.2d 241, 248 n.6 (5th Cir.), cert. denied 103 S. Ct. 102 (1982) (declining to decide whether vindictiveness concept inapplicable as no vindictiveness found in case). But see, State v. Stevens, 96 N.M. 627, 633 P.2d 1225 (N.M. 1981) infra Note 101.

81 United States. v. Ruesga-Martinez, 534 F.2d 1367, 1370 n.6 (9th Cir. 1976) (prosecution aware alien was multiple offender when misdemeanor charge of unlawful entry filed under 8 U.S.C.A. § 1325 (1970). Two-count felony indictment filed alleging defendant was a multiple offender and reentered country after deportation. See 8 U.S.C.A. § 1326 (1970)).

82 United States v. Jones, 587 F.2d 802, 805 (5th Cir. 1979) (reindictment raised appearance of vindictiveness, but new evidence discovered after first indictment returned).

prosecutor, followed by the prosecutor charging them with an additional count of conspiracy to commit the initial offenses.[83] The standard adopted was whether a "realistic likelihood" of vindictiveness was raised by the facts of a particular case.[84] The prosecution was of course entitled to disprove this likelihood, but the argument that the first prosecutor had simply made a mistake would not be sufficient. However, the court would consider evidence that the prosecutor was inexperienced or had problems scheduling the grand jury hearing.[85]

The nature of the pretrial right exercised by a defendant did not make a great deal of difference to the outcome. Blackledge was held to apply when the defendant successfully exercised a variety of pretrial rights such as: moving to dismiss a charge under the Speedy Trial Act,[86] asserting a right to a change

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83 United States v. Andrews, 633 F.2d 449 (6th Cir. 1980) (en banc), cert. denied 450 U.S. 927 (1981). One panel of the Sixth Circuit had been unable to reach agreement on the standard to apply, see United States v. Andrews, 612 F.2d 235 (6th Cir. 1980). In the en banc decision the Sixth Circuit did not require actual vindictiveness be established, because that would require a judge to call the prosecutor a "liar" if he did not accept the reasons for increasing the charges, but the court did not accept an appearance of vindictiveness standard. 633 F.2d at 455. The district court had applied the Ninth Circuit presumption standard, see United States v. Andrews, 444 F.Supp. 1238 (E.D. Mich. 1978). See also 25 VILL. L. REV. 365 (1979) (reviews first decision of Sixth Circuit and suggests that actual vindictiveness standard is consistent with Blackledge).

84 633 F.2d at 455.

85 Id. at 456. See United States v. Ricard, 563 F.2d 45 (2d Cir. 1977) (review of file by a new prosecutor justified superceding indictment that substituted felony count for original misdemeanor and added a felony count based on same transaction).

86 United States v. Groves, 571 F.2d 450,452-53 (9th Cir. 1978) (prosecutor maintained that felony charges were brought after defendant did not live up to agreement to cooperate with federal agents. This argument was rejected because the defendant had told agents from the outset he would not testify). See 18 U.S.C.A. § 3161(b) (supp. 1983).

of venue,[87] moving to dismiss an indictment because the government had failed to preserve an agent's notes,[88] refusing to enter pleas by a specific date and seeking judicial sanctions against the prosecutor,[89] successfully pleading nolo contendre over the objection of the prosecutor,[90] obtaining a continuance to investigate the legality of a search,[91] moving for dismissal of a count because the judge had not properly executed the summons and charges,[92] moving to suppress evidence,[93] refusing to waive a claim that an earlier motion to dismiss

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87 United States v. DeMarco, 550 F.2d 1224 (9th Cir.), cert. denied 434 U.S. 827 (1977).

88 United States v. Griffin, 617 F.2d 1342, 1347-48 (9th Cir.), cert. denied 449 U.S. 863 (1980) (trial judge did not abuse discretion in finding no appearance of vindictiveness because unrelated government agencies investigated case, separate conduct was charged, and no indication that second investigation and additional charges were unreasonably delayed).

89 United States v. Phillips, 664 F.2d 971 (5th Cir. 1981) (vindictiveness not found because new evidence discovered).

90 United States v. Veliscol Chem. Corp., 498 F. Supp. 1255 (D.C. 1980) (actual vindictiveness shown by threats and fact government indicted individual officers instead of corporation after plea to misdemeanor charge accepted).

91 United States v. Alvarado-Sandoval, 557 F.2d 645 (9th Cir. 1977) (information known to U.S. Attorney's office when misdemeanor complaint filed. Held immaterial that attorney who initially appeared did not personally know of defendant's prior record.).

92 Adams v. State, 48 Md. App. 447, 428 A.2d 447 (Md. Ct. Spec. App. 1981) (followed the Fourth Circuit's decision in Goodwin).

93 United States v. O'Brien, 123 Ariz. 575, 601 P.2d 338 (Ct. App. 1979) (even though prosecution and defense agreed sentence would not exceed maximum for involuntary manslaughter, the defendant was prejudiced by having to defend against a murder charge); United States v. Burt, 619 F.2d 831 (9th Cir. 1980) (federal prosecution followed state trial where charges were dismissed. Vindictiveness not established because the decision to file federal charges made prior to motion).

had been withdrawn because of threat to add a harsher charge[94] moving to consolidate a trial with that of sixteen other defendants,[95] moving for dismissal of vague counts in an indictment,[96] or electing trial before a district court judge instead of a magistrate.[97]

One circuit defined the right protected as one carrying "due process implications" that affected a defendant's ability to receive a fair trial. A demand, prior to indictment, for the return of funds confiscated at the U.S.-Canadian border was held not to be that kind of right.[98] Claiming the right against self incrimination before a grand jury also has been held not to raise vindictiveness.[99] But neither of these situations involved exercising a

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94 Atchak v. State, 640 P.2d 135 (Alaska App. 1981).

95 United States v. Schiller, 424 A.2d 51,56-57 (D.C. Cir. 1980) (appearance of vindictiveness raised by additional counts, but rebutted by prosecutor's change of mind after trials were consolidated, and "slight" government interest in preventing consolidated trials); Wynn v. United States, 386 A.2d 695 (D.C. Cir. 1978) (Blackledge applies when additional charges brought after dismissal of original charges for want of prosecution).

96 United States v. Farinas, 308 F. Supp. 459 (S.D.N.Y. 1969) (no vindictiveness as maximum sentence not increased).

97 United States v. Lippi, 435 F.Supp. 808 (D. N.J. 1977) (initially charged with misdemeanor, defendant told that felony charges would be filed if he did not elect trial before a magistrate. Six felony counts returned after he demanded district court trial. Prosecutor could not rebut apparent vindictiveness because evidence supporting felonies was known shortly after misdemeanor charges filed).

98 United States v. Staley, 571 F.2d 440,443 (8th Cir. 1978).

99 In Re DeMonte, no. 81-2804 (7th Cir. Dec. 10 1981); United States v. Linton, 655 F.2d 930 (9th Cir. 1980). See United States v. Walker, 514 F.Supp. 294 (E.D. La. 1981) (extensive discussion of Fifth Circuit cases, but vindictiveness not raised by facts because defendant did not exercise a right).
(Footnote Continued)

right after the first charges are filed, so vindictiveness was actually not in issue. One court held that Blackledge does not apply when a defendant requests a continuance prior to trial, even if then charged with a felony.[100] The Supreme Court of New Mexico has also ruled that Blackledge did not apply when a defendant moved to suppress evidence and was then charged with murder.[101]

One pretrial right that carries due process implications is the right to a jury trial.[102] It was a demand for a jury trial that began the chain of events leading to Learly Goodwin's felony indictment. After he refused to waive jury trial his case file was assigned to a new prosecutor. While preparing for trial that prosecutor contacted the complaining officer and investigated Goodwin's

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(Footnote Continued)
See also, United States v. Peters, 625 F.2d 366 (10th Cir. 1980) (Blackledge inapplicable when defendant alleges original charges brought because he would not incriminate another person).

100 Washington v. United States, 434 A.2d 394, 396 (D.C. Cir. 1980) (Blackledge limited to harsher treatment after conviction set aside). Contra, United States v. Ruesga-Martinez, supra note 79; United States v. Schiller, Wynn v. United States, supra note 95.

101 State v. Stevens, 96 N.M. 627, 633 P.2d 1225 (1981). In Stevens the defendant was initially charged with assault and alternative counts of voluntary and involuntary manslaughter. He moved to suppress evidence and a second indictment was then filed, charging second degree murder. The motion to suppress was granted and the defendant successfully moved to quash the second indictment because it was filed while the first was pending. The prosecutor then obtained a third indictment containing an "open" charge of murder. The trial court denied defendant's motion to dismiss but the appeals court reversed, holding that a presumption arose. The New Mexico Supreme Court reversed. Id. at 1225-26. The court noted the different approaches taken by the circuit courts and that the Supreme Court had never applied a presumption in pretrial cases, and held that vindictiveness would not be presumed in pretrial cases.

102 See United States v. Sturgill, 563 F.2d 307,309 n.2 (6th Cir. 1977) (additional counts were filed after defendant demanded a jury trial, but actually tried on charges carrying a lesser penalty than original).

background. He discovered that Goodwin had been convicted in California and Virginia, had a lengthy criminal record, and was suspected of extensive drug dealings.[103] It was after he had conducted this investigation that he obtained the felony indictment.[104] Goodwin moved to dismiss the felony count of assault on a federal officer, alleging it was brought to retaliate for his demanding a jury trial. The trial judge agreed that the appearance of vindictiveness had been raised, but also found that the prosecution had adequately dispelled the appearance because of the additional information.[105]

The Fourth Circuit held that the additional information gathered by the prosecutor did not dispel the apparent vindictiveness because that information was available before Goodwin demanded a jury trial:

> Although the information which led the United States Attorney to seek a felony indictment may not have been in his possession until defendant exercised his right to a jury trial and the case was transferred from the magistrate to the district court, the information was available to the government if not from the outset, at least prior to Goodwin's election of a jury trial.[106]

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103 See note 49 supra.

104 A person's criminal record or involvement in criminal activity is a recognized factor bearing on a prosecutor's charging decision. See ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, §§ 3.9, 1.1, 2.5 (Approved Draft 1971); UNITED STATES DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, 9 (1980) (hereinafter PRINCIPLES OF FEDERAL PROSECUTION).

105 See note 53 supra.

106 United States v. Goodwin, 637 F.2d at 255.

The Supreme Court did not address the issue of what evidence the prosecution will be held to know when individual prosecutors make charging decisions. Instead, it treated the issue as simply involving presumptions and declined to apply what it called "an inflexible presumption of prosecutorial vindictiveness in a pretrial setting."[107] It gave four reasons for not applying a presumption of vindictiveness when a prosecutor retaliated prior to trial: prior to trial the prosecution may not have all the evidence, defendants are expected to exercise rights that make a prosecutor's job more difficult, a prosecutor should remain free prior to trial to exercise his discretion, and a jury trial does not involve the duplication of effort and "institutional bias" against re-trying cases present in Blackledge and Pearce.[108]

Although a presumption of vindictiveness is not applicable, a defendant could still establish a due process violation, if he can prove the prosecutor actually intended to punish him:

> In declining to apply a presumption of vindictiveness, we of course do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for something the law plainly allowed him to do.[109]

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107 457 U.S. at 381.

108 Id.

109 Id. at 384. Justice Blackmun saw no reason to distinguish postrial from pretrial cases, but felt the prosecution had adequately rebutted any appearance of vindictiveness. Id. at 385 (Blackmun, J. concurring). Justices Brennan and Marshall believed that a demand for a jury trial triggered Blackledge but did not address the adequacy of the rebuttal evidence. Id. at 386 (Brennan, Marshall, J. J., dissenting).

The most significant aspect of the decision is the Court's treatment of the burden of persuasion after the prosecutor has upped the ante. Who has the burden depends on when the charges against a defendant have been made more severe. The prosecution has the burden of rebutting presumed vindictiveness after a successful appeal. But the defendant now has the difficult burden of proving that the prosecutor increased the severity of the charges to retaliate against him prior to the initial trial:

> As the Government states in its brief: Accordingly while the prosecutor's charging decision is presumptively lawful, and the prosecutor is not required to sustain any burden of justification for an increase in charges, the defendant is free to tender evidence to the court to support a claim that enhanced charges are a direct and unjustifiable penalty for the exercise of a protected right. Of course, only in a rare case would a defendant be able to overcome the presumptive validity of the prosecutor's actions through such a demonstration.[110]

Lower courts have followed Goodwin and refused to apply a presumption of vindictiveness where the defendant demanded a jury trial and was then indicted on additional charges,[111] refused to plead guilty and was indicted on harsher charges,[112] successfully obtained dismissal of a weapons charge and was then

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110 Id. at 384 n.19. (emphasis added). This footnote to the majority opinion is not addressed in the dissenting or concurring opinions.

111 State v. Schneider, 661 P.2d 651 (Ariz. App. 1982).

112 United States v. Gallegos-Curiel, 681 F.2d 1164 (9th Cir. 1981); United States v. Currie, 667 F.2d 1251 (9th Cir.), vacated and remanded 457 U.S.(1982), aff'd on rehearing 682 F.2d 846 (9th Cir. 1982); United States v. Johnson, 679 F.2d 54 (5th Cir. 1982).

charged with an additional assault charge,[113] or refused to waive a state grand jury indictment and was then indicted on a more serious offense.[114] Where a federal prisoner successfully attacked a United States Parole Commission's calculation of his presumptive release date, the Fourth Circuit has held that the pretrial test in Goodwin applies.[115]

But Goodwin has not been extended to require that actual vindictiveness be shown on the part of a sentencing judge. In Longval v. Meacham,[116] the defendant was on trial for robbery, theft, and use of a shotgun. The trial judge told his lawyer that if Longval did not plea bargain he might receive a "substantial" prison sentence. The defendant refused, and was sentenced to a forty to fifty year term. The First Circuit remanded for resentencing by a

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113 People v. Farrow, 133 Cal. App.3d 147 (1982) (initial charge dismissed because not brought to trial within sixty days). See CAL. PEN. C. § 1382 (West 1982).

114 Dyer v. State, 666 P.2d 438 (Alaska App. 1983). See United States v. Allen, 699 F.2d 458 (9th Cir. 1982) (Goodwin applied when federal prosecutor waited until conclusion of another federal trial in a different district before indicting defendant, but no actual vindictiveness found). See also, United States v. Hinton, 703 F.2d 672 (2d Cir.) cert. denied 454 U.S. 1090 (1983) (defense counsel pointed out defect in government's case to the prosecutor who added count in superseding indictment. No actual vindictiveness found). It is still necessary that the second charges be harsher than the first. See United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982).

115 See Fardella v. Garrison, 698 F.2d 208 (4th Cir. 1982) (commission conceded error after prisoner filed habeas corpus petition. Court viewed calculation of parole date as the equivalent of pretrial decisions of a prosecutor and rejected argument that vindictiveness should be presumed. That analysis is wrong as the prisoner essentially appealed the parole classification. The result is correct however, because the presumption would have been rebutted by the new evidence made available to the commission.).

116 651 F.2d 818 (1st Cir. 1981), remanded in accordance with United States v. Goodwin 458 U.S. 1102 (1982), aff'd on rehearing 693 F.2d 236 (1st Cir. 1982).

different judge. The Supreme Court then remanded for reconsideration in light of their decision in Goodwin. On reconsideration the First Circuit again did not require the defendant to show that the judge actually increased the sentence to punish him for exercising his rights because defense counsel would be reluctant to make such a claim about judges they practiced before, and more importantly because it would be an almost impossible burden. Because the facts in that case created a reasonable likelihood that the judge acted vindictively, resentencing by a different judge was again required.[117]

But Goodwin has been improperly applied where a United States Attorney's office, following its established policy, substituted a felony for a misdemeanor because an alien rejected a plea bargain offer by the government.[118] Goodwin is not applicable when a defendant is plea bargaining and is aware the prosecution will bring harsher charges if he does not plead guilty. In this situation the Supreme Court has created an exception to the due process protection against vindictiveness.

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[117] 693 F.2d at 238-39.

[118] United States v. Marucio, 685 F.2d 143,144 n.1. (5th Cir.), cert. denied 103 S. Ct. 498 (1983) misdemeanor complaint initially filed against illegal alien. During plea negotiations prosecutor stated felony charge would be brought if Marucio did not plead to misdemeanor.).

IV. Plea Bargaining

Assume that during plea negotiations a prosecutor informs the defendant that if his offer is not accepted, additional charges will be filed, but this does not persuade the defendant to accept his offer. True to his word the prosecutor then brings the additional charge. On its face, retaliation is clear because the additional charge directly results from the exercise of a right. In theory Blackledge should apply to prohibit filing the additional charge, but this is not the case. In Bordenkircher v. Hayes,[119] the Supreme Court held that a prosecutor does not violate due process by threatening or bringing harsher charges if he does so as part of plea negotiations.

Paul Lewis Hayes was initially indicted in Kentucky for uttering a forged instrument. He had a criminal record (two prior felonies) and was subject to a mandatory life sentence if convicted of a third felony. During plea negotiations the prosecutor offered to recommend a five year prison sentence if Hayes would plead to the charge. He told Hayes that if he did not plead, he would

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[119] 434 U.S. 357, reh. denied 435 U.S. 918 (1978). See Smaltz, Due Process Limitations on Prosecutorial Discretion in Re-charging Defendants: Pearce to Blackledge to Bordenkircher, 36 WASH. & LEE L.REV. 347 (1979) (result in Bordenkircher a narrow exception to due process protection against prosecutor retaliating). My interviews with prosecutors and defense counsel were not intended to be a survey of their opinions or to establish any statistics on how often charges are increased by prosecutors. Most of the defense counsel I interviewed seldom ran into vindictiveness issues with retrial cases and did not have much more experience with pretrial increases. But this area of prosecutors threatening to file harsher charges during plea bargaining drew a definite response from most of them. One snapped that local district attorneys "always" threatened to bring more severe charges during plea bargaining.

bring the habitual offender charge. Hayes rejected the offer, the prosecutor added the habitual offender charge, and Hayes received a life sentence.[120]

The district court denied Hayes' petition for habeas corpus, but the Sixth Circuit reversed and remanded with instructions to impose confinement based solely on the forged instrument charge.[121] Although the Sixth Circuit recognized that plea bargaining was important to the criminal justice system, it held that its legitimate purposes were not served by the coercion in Hayes's case, and it applied Blackledge:

> When a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges. Accordingly, if after plea negotiations fail, he then procures an indictment charging a more serious crime a strong inference is created that the only reason for the more serious charge is vindictiveness. Under these circumstances, the prosecutor should be required to justify his action. In this case, a vindictive motive need not be inferred. The prosecutor has admitted it.[122]

Kentucky appealed to the Supreme Court which reversed the Sixth Circuit. The Court acknowledged the obvious: that the prosecutor's motive had been to discourage Hayes from pleading not guilty and going to trial. But it distinguished plea bargaining from the rules established in Pearce and Blackledge:

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120 Id. at 358-59 nn.1-3.

121 Hayes v. Cowan, 547 F.2d 42, 45 (6th Cir. 1976).

122 Id. at 44-45.

> In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction--a situation 'very different from the give-and-take negotiation common in plea bargaining between the prosecution and the defense which arguably possess relatively equal bargaining power.' The Court has emphasized that the due process violation in cases such as Pearce and Perry lay not in the possibility that a defendant might be deterred from the exercise of a legal right, but rather that the State might be retaliating against the defendant for lawfully attacking his conviction.[123]

As long as a defendant was free to accept or reject the prosecutor's offer there could not be impermissible retaliation in this situation, even though the prosecutor's aim is to persuade the defendant to give up a right to plead not guilty.[124] The Court did state that even though the prosecutor has broad discretion in this area, he was required to give notice of his intentions:

> Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating to the original indictment had ended with the defendant's insistence on pleading not guilty. As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.[125]

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123 434 U.S. at 363. It was not clear until the Goodwin decision that the Court was primarily concerned with protecting defendants after their conviction, and not with protecting against retaliation prior to trial.

124 Id. at 364.

125 Id. at 361. But see Sefchek v. Brewer, 301 F. Supp. 793, 795 (E.D. Iowa 1969) (defendant pled guilty to uttering a false check with a seven year maximum sentence. After his conviction was set aside a charge of uttering a forged instrument with a ten year maximum substituted; both charges based on the same check. Pearce extended to prosecutor's action and conviction declared void). The ABA standards on guilty pleas allow prosecutors to agree to dismissal of

(Footnote Continued)

Justices Blackmun, Brennan, and Marshall dissented on the grounds that once vindictiveness was found it did not matter whether it occurred after reversal of a conviction or during plea negotiations.[126] Justice Powell filed a separate dissent arguing that because a prosecutor's charging decision is normally not reviewed, he should not be allowed to adopt "a strategy calculated solely to deter the exercise of constitutional rights."[127]

The majority and three dissenting justices saw practical problems with the opposing views. The majority felt that if Blackledge were applied to plea negotiations prosecutors would not be able to express their intentions freely and this would "invite unhealthy subterfuge" in plea bargaining.[128] Justices Blackmun, Brennan and Marshall saw problems for defendants if their views were adopted. Prosecutors would then bring all available charges from the outset, leading to higher bail and reluctance of judges to accept negotiated pleas. However, this result was outweighed by the benefit of requiring prosecutors to fix the incentives from the outset, the desirability of having charging decisions visible, and avoiding the "questionable fairness" of requiring a

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(Footnote Continued)
existing or potential charges. ABA STANDARDS RELATING TO PLEAS OF GUILTY, STANDARD 3.1 (approved draft 1968). The potential charges can include "multiple offender charges which might follow the pending conviction, and charges which are not within the jurisdiction of the agreeing prosecutor." Id. at 67 (commentary).

126 Id. at 365.

127 Id. at 373.

128 Id. at 365.

defendant to negotiate against a charge without knowing if the prosecutor could actually obtain an indictment.[129]

In Bordenkircher the defendant was directly advised of the prosecutor's intention. While this may be the usual case[130] even this is not required. If the prosecutor's intention to bring harsher charges can reasonably be inferred under the circumstances, the defendant will be considered to be on notice.[131] If the defendant initially accepts the bargain, pleads guilty to some of the charges against him, but later withdraws his plea, he may properly be tried on all the original charges.[132] The prosecutor may also bring charges that he told the defendant he intended to bring, but did not as part of the plea

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129 Id. at 368 n.2. Prosecutors in England have less freedom to strike plea bargains as English judges will insist the defendant plead to the most serious crime shown by the evidence. See Davis, Sentences for Sale: A New Look at Plea Bargaining in England and America, 1971 CRIM. L. REV. 221-23.

130 See, e.g., United States v. Litton Systems, Inc., 573 F.2d 195 (4th Cir.), cert. denied 439 U.S. 828 (1978) (corporation considered to be on notice of possible indictment if it did not agree to rehearing of claim against government); People v. Rivera, 127 Cal. App.3d 136 (1981) (defendant shown amended information containing harsher charge).

131 See, e.g., Ehl v. Estelle, 656 F.2d 166 (5th Cir. 1981) (defendant aware habitual offender charge would be filed if he withdrew guilty plea); United States v. Moore, 653 F.2d 384 (9th Cir. 1981) (threat to indict defendant and wife reasonably implied by plea offer). But see People v. Walker, 84 Ill.2d 512,419 N.E.2d 1167 (1981) (vindictiveness established when defendant not advised of prosecutor's intention to seek death penalty if guilty plea vacated).

132 See, e.g., United States v. Williams, 534 F.2d 119 (8th Cir. 1976); United States v. Gilliss, 645 F.2d 1269 (8th Cir. 1981); Martinez v. Estelle, 527 F.2d 133 (5th Cir.), cert. denied 429 U.S. 924 (1976); United States v. Osborne, 591 F.2d 413 (8th Cir. 1978); Commonwealth v. Ward, 493 Pa. 115, 425 A.2d 401, cert. denied 451 U.S. 974 (1981); United States v. Herrera, 640 F.2d 958 (9th Cir. 1981); United States v. Barker, 681 F.2d 589 (9th Cir. 1982).

agreement.[133] He is also not required to discuss any further plea bargains with the defendant.[134]

The difficulty with Bordenkircher[135] is that the Court upheld a prosecutor's actions that it had condemned in Blackledge. The only reason Hayes faced

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133 See United States v. Anderson, 514 F.2d 585 (7th Cir. 1975) (prosecutor agreed to file misdemeanor vice felony charge. After plea to misdemeanor set aside felony charge could be filed); United States v. Vaughan, 565 F.2d 283 (4th Cir. 1977); United States v. Gardner, 611 F.2d 770 (9th Cir. 1980). Harvey v. United States, 395 A.2d 92 (D.C. Ct. App.) cert. denied 441 U.S. (1979). In Harvey the court encouraged prosecutors to bring all charges from the outset. "However, we believe the better practice is to bring all the charges in the original indictment unless there are compelling reasons for bringing the new or additional charges, e.g., newly discovered evidence." Id. at 98.

134 See Chapman v. Estelle, 593 F.2d 687 (5th Cir. 1979) (prosecutor refused to discuss plea bargain after defendant's guilty plea set aside. Original charges were refiled, and defense claim that actual vindictiveness present was rejected); Ward v. Page, 424 F.2d 491 (10th Cir.), cert. denied 400 U.S. 917 (1970). Contra, Mulreed v. Kropp, 425 F.2d 1095 (6th Cir. 1970); Rivers v. Lucas, 477 F.2d 199 (6th Cir.), vacated as moot 414 U.S. 896 (1973); People v. McMiller, 398 Mich. 425, 208 N.W.2d 451, cert. denied 414 U.S. 1080 (1973) (prosecutor cannot charge more severe offense arising from same transaction after plea vacated). One writer suggests that the potential for vindictiveness exists when a defendant successfully appeals from an "offense" bargain and the prosecutor must allow him to plead again to the bargained-for charge. See Borman, The Chilled Right to Appeal From a Plea Bargain Conviction: A Due Process Cure, 69 N.W.U.L. REV. 663, 694-95 (1975).

135 Bordenkircher has been criticized by a number of writers. See Abrams, Systematic Coercion: Unconstitutional Conditions in the Criminal Law, 72 J. CRIM. L. & CRIMINOLOGY 128 (1981) (criticizes decision for failing to apply the unconstitutional conditions doctrine); Rubin, The Resurrection of the Right-Privilege Distinction? A Critical Look at Maher v. Roe and Bordenkircher v. Hayes, 7 HAST. CONST. L. Q. 165, 197 (1980) (decision abandons concept of preventative deterrence); Comment, Prosecutorial Vindictiveness and Plea Bargaining: What are the Limits?, 27 DE PAUL L. REV. 1241 (1977) (criticizes decision for view of facts in the case); Comment, Bordenkircher v. Hayes, 2 CRIM. JUSTICE J. 401 (1979) (notes Kentucky changed recidivist statute after Hayes' conviction and Hayes would receive ten to twelve years under new statute); Note, The Relationship Between Prosecutorial Discretion and Vindictiveness in Plea Bargaining, 33 ARK. L. REV. 211, 223 (1979) (arguing that (Footnote Continued)

(and received) a life sentence was because he refused to "save the court the inconvenience and necessity of a trial."[136] The prosecutor had a stake in discouraging not guilty pleas, and the means to discourage them: withholding an habitual offender charge carrying a mandatory life sentence. In contrast to the situation in Blackledge, the prosecutor also admitted the reason the habitual offender charge was added was because Hayes insisted on pleading not guilty. The issue was not whether a realistic likelihood of vindictiveness should control, but whether actual vindictiveness was present.

The Court upheld the prosecutor's actions on the grounds that Hayes was on notice of his intentions: "But in the 'give and take' of plea bargaining, there is no such element of punishment or retaliation so long as the defendant is free to accept or reject the prosecution's offer."[137] Of course Hayes was punished no less because the prosecution told him what would happen if he insisted on pleading not guilty. The fact that he was on notice did not change the fact he

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(Footnote Continued)
the Supreme Court improperly relied on the safeguards necessary for a knowing and intelligent guilty plea instead of safeguards against prosecutorial vindictiveness). But see Pizzi, Prosecutorial Discretion, Plea Bargaining and the Supreme Court's Decision in Bordenkircher v. Hayes, 6 HAST. CONST. L. Q. 269 (1979) (dissent position unworkable); Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 CALIF. L. REV. 471, 487 n.66 (1978) (decision affirms protection against vindictiveness, but facts did not establish improper motivation. This interpretation is at odds with the author's analysis of a similar fact pattern at 486-87); McCoy, Plea Bargaining as Due Process in Determining Guilt, 32 STAN. L. REV. 887, 915 (1980) (decision recognizes that plea bargaining is adequate procedure for determining guilt).

136 Bordenkircher v. Hayes, 434 U.S. at 358.

137 434 U.S. at 363.

was punished, but it made filing the habitual offender charge acceptable to the Court.

If notice, and an opportunity to make an informed, albeit difficult, choice were the primary reason for the result in Bordenkircher, the case makes good sense. The defendant is willing to bargain away his right to plead not guilty. A threat to bring harsher charges is a bargaining chip for the prosecutor, as is the defendant's threat to force the prosecutor to run the risk and effort at a contested trial. Also, even though threatened charges do not violate a defendant's due process right, the prosecution does not have unlimited freedom. He is still expected to have probable cause to support the threatened charge, selection of the charge must not be based on an "unjustifiable standard such as race, (or) religion,"[138] and if the plea was coerced, the defendant may withdraw the plea.[139]

But the primary basis for the Court's decision in Bordenkircher is its belief that the freedom to threaten additional charges is necessary to the

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138 A defendant may allege that the statute he is charged with violating has not been enforced, and is being used against him because of his race or exercise of first amendment rights. He has the burden of proving both those facts, however. See United States v. Falk, 479 F.2d 616 (7th Cir. 1973); Yick Wo v. Hopkins, 118 U.S. 356 (1896); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972); Cox, Prosecutorial Discretion: An Overview, 13 AM. CRIM. L. REV. 383 (1976) (describes majority view that prosecutor's discretion is immune from judicial review and selective prosecution cases difficult to prove).

139 The grounds for withdrawing guilty pleas is beyond the scope of this paper. For a discussion of withdrawing guilty pleas under Fed. R. Crim. P. 32(d), see Annot., 9 A.L.R. FED. 707 (1979) (discussing effect of judge failing to advise defendant of special parole term for narcotic offenses); 28 U.S.C.A. § 2255 (1971) (vacation of sentence on collateral grounds).

survival of the practice of plea bargaining,[140] and that if this freedom were restricted by the courts, the collateral results would be detrimental to defendants as a group.[141] But I question the idea that the institution of plea bargaining cannot survive if prosecutors were expected to bring charges, such as an habitual offender allegation, from the outset.[142] There may be sound reasons for not doing so, but if there are, they do not disappear when a defendant desires to plead not guilty. A defendant's right to plead not guilty and have a trial on the original charges should be given more weight than the administrative inconvenience involved in filing the most serious charges from the outset.

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[140] Michigan requires that habitual offender allegations be filed before plea negotiations are conducted. People v. Fountain, 407 Mich. 96, 282 N.W.2d 168 (1979); People v. Martin, 100 Mich. App. 447, 298 N.W.2d 900 (1980) (threat of habitual offender charge "always creates appearance of coercion). See also PRINCIPLES OF FEDERAL PROSECUTION at 18 (charging every offense may be perceived as an "unfair attempt to induce a guilty plea"); NATIONAL PROSECUTION STANDARDS, 9.4 (Nat'l Dist. Attorneys Ass'n 1979) ("The prosecutor shall not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges.").

[141] In Goodwin the Court noted that if it had condemned the threat of adding charges, that "an equally compelling argument could be made that a prosecutor's initial charging decision could never be influenced by what he hoped to gain in the course of plea negotiation." 457 U.S. at 379, n.10 (emphasis added). This analysis is inapplicable, because the first charging decision would not follow the exercise of a right, therefore no issue of retaliation is even raised. Viewing the initial charging decision as somehow involving "additional" charges, the Court said: "If such use of 'additional' charges were presumptively invalid, the institution of plea negotiation could not survive." Id.

[142] In the same footnote the Court recognized that had Bordenkircher been decided differently, prosecutors would be motivated to bring the most severe charges from the outset. This would then, in the Court's view, lead to defendants having to plea bargain against harsher charges, facing higher bails and reluctance of judges to accept negotiated please. Id. But a defendant does bargain against harsher charges under their ruling in Bordenkircher. Also, if a prosecutor desires to allow a defendant to face lesser bail, that motivation should not change just because a plea of not guilty is entered. And charging lesser offenses, but plea bargaining against greater, involves the same sort of "subterfuge" the Court desired to avoid in Bordenkircher.

The Court's rationale for Bordenkircher leads to the situation that a person charged with an offense cannot pursue his constitutional rights at a trial without apprehension that the prosecutor will retaliate, because it would somehow be detrimental to the administration of justice for him to be charged with the full extent of his criminal activities from the outset. This elevates the potential burden on prosecutors too high, assumes too much, and is an insufficient rationale for not safeguarding a defendant's right to be free from vindictive charging decisions.

If the prosecutor does not inform the defendant that he will add charges if his offer is not accepted, the defendant will have the burden of proving that the additional charges stem from actual vindictiveness, because they will have been brought prior to trial. The holding in Bordenkircher that actual vindictiveness is never present when the ante is upped following unsuccessful plea negotiations does not apply, because the defendant was not told of the prosecutor's intention. The fact that the increase followed unsuccessful plea negotiations should be considered with all the evidence in the case to determine if actual vindictiveness has been established.

If the defendant accepts the offer, pleads guilty, but later successfully withdraws his plea, may the prosecutor then file harsher charges that were not discussed during the earlier plea negotiations? If justified by new evidence any appearance of vindictiveness is of course overcome.[143] Prior to

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[143] United States v. Black, 609 F.2d 1330 (9th Cir. 1979) (after indicted for (Footnote Continued)

Bordenkircher three courts found vindictiveness in that situation,[144] and one state court has held that Bordenkircher does not permit adding an habitual offender allegation after a guilty plea is set aside.[145] If the prosecutor does not disclose his intention to file additional charges, the question after Goodwin is whether actual or presumed vindictiveness is the test. Even though the guilty plea was set aside, a defendant has been tried, found guilty and may have served part of his sentence. While the defendant may be returned to his original position, the prosecution has not been content with that, but has chosen to up the ante. The argument is that the "institutional bias" against retrying a settled question and the interest in insuring guilty pleas are voluntarily and intelligently made support applying a presumption of vindictiveness. However, the defendant has not fully complied with his part of the plea bargain. The prosecution argument is that both sides are returned to the plea bargaining stage and therefore the defendant must prove actual vindictiveness.

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threatening federal judge, the defendant sent two more threatening letters to the judge. Adding post-indictment counts after his plea was withdrawn not vindictive).

144 Sefcheck v. Brewer, supra note 125; United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976) (defendant's pleas to two counts of four-count indictment vacated; prosecution brought forty-two count indictment based on facts known from the outset. Additional counts set aside for vindictiveness, but defendant could be tried on the original indictment); State v. Boudreaux, 402 So.2d 629 (La. 1981).

145 See People v. Ivery, 615 P.2d 80 (Colo. Ct. App. 1980) (after guilty plea accepted, conviction considered final under state law. Prosecutor not permitted to file additional habitual offender allegation at retrial); Borman, The Chilled Right to Appeal from a Plea Bargain Conviction: A Due Process Cure, 69 N.W.U. L. REV. 663, 693 (1975); Note, "Upping the Ante" Against the Defendant Who Successfully Attacks His Guilty Plea: Double Jeopardy and Due Process Implications, 50 NOTRE DAME LAWYER 857 (1975) (if harsher charge brought after plea withdrawn appearance of vindictiveness is raised).

The added charge was known to the prosecution before plea negotiations, was not formally field, and the defendant was not told that he could face that charge during negotiations. The interest the prosecution is seeking to protect is not to return to the original starting point, but rather the freedom to withhold a charge to be used after a conviction is set aside. Also, the Supreme Court's concern with hurting the practice of plea bargaining is not applicable. The pressure on the prosecutor is not to add all known charges from the outset, but simply to notify the defendant of his intentions, an action the Court approved of in Bordenkircher. When the prosecutor ups the ante by adding a known charge after a plea bargained connection is set aside, and has not disclosed that potential charge during the plea negotiations, the defendant should be entitled to a presumption that the added charge is vindictively motivated.

IV. Mistrials

Goodwin establishes completion of the first trial as the point where the burden of persuasion changes. Once the ante has been upped, the prosecution must rebut presumed vindictiveness after trial, while the defendant must prove actual retaliation prior to trial. Which of these standards should apply when harsher charges are brought after the defendant successfully obtains a mistrial?

Prior to Goodwin the courts generally held that if the ante was upped after a mistrial a defendant could prevail by showing apparent vindictiveness.[146] However, the defendant must have moved for the mistrial to establish that a right had been exercised.[147] Also, if the harsher charges arose from separate incidents, any appearance of vindictiveness could be rebutted.[148]

One assumption made by the Court in the Goodwin decision is that at some point the prosecution is expected to have investigated and made a considered decision about which charges are appropriate in a case. That point is clearly at the end of the first trial if the defendant is convicted, but it should also include the start of a trial. A mistrial involves duplication of effort to resolve a case. The prosecutor has done his pretrial preparation, devoted time and possibly government funds to put on the trial, only to be faced with the necessity of repeating all his efforts to obtain a conviction. In fact, it is

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146 See, e.g., United States v. Jamison, 505 F.2d 407 (D.C. Ct. App. 1974) (defendant originally charged with second degree murder, and motion for mistrial granted. Then indicted for first degree murder); Curry v. State, 281 S.E.2d 604 (Ga. 1981) (after mistrial additional charges based on same incident filed); United states v. D'Alo, 486 F. Supp. 954 (D. R.I. 1980) (after mistrial defendant charged with different offenses that did not raise maximum sentence. However charges were dismissed because government had improved chance of conviction by revising charges. This case has not been followed by other courts); Johnson v. State, 396 A.2d 163 (Del. 1978) (murder charge with mandatory life sentence brought after mistrial); United States v. Motley, 655 F.2d 186 (9th Cir. 1981) (superceding indictment brought after mistrial exposed defendant to additional ten years confinement). Contra, United States v. Ruppel, 666 F.2d 261 (5th Cir. 1982) (mistrial resulting from hung jury does not raise presumption of vindictiveness).

147 United States v. Thurnhuber, 572 F.2d 1307 (9th Cir. 1977).

148 United States v. Preciado-Gomez, 529 F.2d 935 (9th Cir.), cert. denied 425 U.S. 953 (1976); United States v. Arias, 575 F.2d 253 (9th Cir. 1978).

more likely that a prosecutor would retaliate while the "loss" is fresh in his mind[149] than years later when a conviction is reversed on appeal.[150]

Choosing the start of the trial as the point where the burden shifts has the benefit of establishing the stakes at the outset. This places a premium on thorough preparation by the prosecution,[151] but the people should expect no less from their prosecutors and the practical problems that exist are not so great that the start of trial is an unreasonable point to hold the prosecution to their charges.

The Supreme Court of California and one California appellate court have also held that Goodwin allows a presumption of vindictiveness when the ante is upped after a mistrial.[152] The Supreme Court of Indiana has gone further,

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149 "[T]he likelihood of vindictiveness after mistrials is significant, so prosecutors should be required to justify any subsequent increase in charges." 81 MICH L. REV. at 214 n.99.

150 This is unlike the situation where the remote possibility that a conviction will be reversed has little or no influence on charging decisions. Id. at 219.

151 I discussed this issue with an Assistant United States Attorney from San Diego, an Assistant District Attorney from San Diego, and a senior deputy District Attorney from Cook County, Illinois. Both San Diego prosecutors said their offices encounter lengthy delays in receiving criminal records. The deputy from Cook County, however, said his office receives information on defendants within a few days. All three said their office organization led to case files starting with inexperienced attorneys, moving to a more experienced attorney as the case got closer to trial. The San Diego deputy also pointed out than even when a case is close to trial, many cases were negotiated out at this stage. This led to cases not being fully prepared until shortly before the actual trial date, to avoid a waste of effort.

152 Twiggs v. Superior Court, 34 Cal.3d 360, 194 Cal. Rptr. 152 (1983) (five prior felony convictions alleged after hung jury and mistrial); Barajas v.
(Footnote Continued)

holding that the prosecution is barred from showing a lack of vindictive motivation after harsher charges are filed after a mistrial.[153]

Presuming vindictiveness when harsher charges are brought after a mistrial is declared at the defendant's request is consistent with the Supreme Court's analysis in Goodwin, lower court decisions prior to and subsequent to that decision, and provides a reasonable protection against the likelihood that the prosecutor has acted vindictively. The prosecutor still has the opportunity to change the charges up to the time of trial without risk he will have to justify any increase, and still has the opportunity to show objective and non-vindictive reasons for increasing the severity of the charges.[154]

(Footnote Continued)
Superior Court, 149 Cal. App.3d 30, 196 Cal. Rptr. 599 (1983) (felony substituted for misdemeanor).

153 Murphy v. State, 453 N.E.2d 219 (Ind. 1983) (the day following a mistrial the prosecutor filed an habitual offender count which raised the maximum sentence from twelve to forty years. The court held:

> Under such circumstances, fundamental fairness precludes a requirement that Defendant show vindictive motivation or that the State be permitted to show its absence. Were we to hold otherwise, an accused in Defendant's predicament would be required to elect whether he would submit to a trial had without due process of law or a trial wherein there was a potential for a much more severe penalty. Our concept of justice simply will not sanction an implicit form of bargaining where the accused must purchase due process of law. Id. at 227 (emphasis added).

154 After defendant successfully moves for a mistrial double jeopardy does not bar his retrial for the same offense unless "the conduct giving rise to the successful motion for a mistrial was prosecutorial or judicial conduct intended to provoke the defendant into moving for a mistrial." Oregon v. Kennedy, 456 U.S. 667 (1982) (emphasis in the original).

VI. Criticism of Goodwin

There is a clear flaw in the Fourth Circuit's decision in Goodwin's case.[155] That court's mistake was in not giving sufficient weight to the evidence that justified the second prosecutor obtaining the felony indictment. Although the substituted felony charge followed two occasions when misdemeanors were filed, it also followed a more extensive inquiry into Goodwin's criminal background than had been done by the first prosecutors.[156] When the Fourth Circuit held the prosecutor to knowledge of all facts available to the government but not actually known, it essentially treated the appearance of vindictiveness standard as a conclusive presumption. Neither the Supreme Court nor any lower court has held that apparent vindictiveness could not be rebutted,[157] nor that prosecutors were held to know all "available" information. The Supreme Court could easily have ruled that a rebuttable presumption of vindictiveness was raised, but that it was overcome by the discovery of evidence about Goodwin's criminal record.[158]

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155 United States v. Goodwin, 637 F.2d 250 (4th Cir. 1981).

156 When Goodwin was returned to the magistrate's court in Maryland the federal prosecutor who appeared was on a two-week assignment to try petty offenses and misdemeanors. Id. at 252. The Assistant United States Attorney who sought the indictment also coordinated Goodwin's return from Virginia to Maryland. Virginia was obligated to return him to California under the Interstate Agreement on Detainers. The Assistant United States Attorney agreed to return Goodwin to California after the district court trial was completed. Affidavit of Assistant United States Attorney Mr. Edward M. Norton, Jr., supra note 49.

157 Contra Murphy v. State, supra note 153.

158 There apparently was some information available to the first prosecutor because Goodwin's FBI record was forwarded in the court file. Affidavit of

(Footnote Continued)

Whenever a prosecutor ups the ante he is exercising his discretion for the second time, in effect, changing his mind about the case. The discretion involved is not the traditional freedom given a prosecutor to bring charges or not, but the discretion to increase the risk to the defendant. Another problem with the Goodwin decision is that the Court gave more weight to this discretion than to the defendant's right to a jury trial.[159] That trial by jury fared badly against a prosecutor's change of mind is extraordinary when compared with the protection afforded a convicted defendant who appeals a conviction. The Constitution does not require that an appeal be afforded to a criminal defendant,[160] yet the effect of Goodwin is that a statutory appeal right is given more protection from vindictiveness than the constitutional right to a

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(Footnote Continued)
Assistant United States Attorney Mr. Edward M. Norton, Jr., supra note 49. One factor that justified the felony charge was the similarity between the Virginia incident and the one at trial. In both, Goodwin violently resisted apprehension for drug possession (proven in the Virginia case and inferred in the federal case). This knowledge of Goodwin's apparent habit of assaulting arresting officers is both objective and a reasonable basis for taking a harsher view of the incident.

[159] Professor Davis' criticism of a prosecutor's unreviewed discretion focuses on the initial decision of whether to charge or not. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 209-13 (1976). See also Recent Developments-Prosecutorial Vindictiveness, supra note 34 (suggesting that the government must show compelling justification for increased charges that follow exercise of fundamental right); In re Lewallen, 23 Cal.3d 274,282, 152 Cal. Rptr. 528,532 (1979) (sentencing judge may not "chill exercise of jury right by imposing a more severe sentence . . . ."). English prosecutors may add more serious charges after a defendant demands a jury trial if the evidence supporting those charges was taken in his presence. R. v. Nesbit, [1971] 3 ALL E.R. 307 (Crim. App.); R. v. Roe, [1967] 1 ALL E.R. (Crim. App.); Queen v. Brown, [1895] 1 Q.B. 119; 11 HALSBURY'S LAWS OF ENGLAND, para. 119 (1976). Contra, R. v. Phillips, 1 ALL E.R. 896 (Crim. App.) ("something in the nature of a trap" to allow increased charges after jury trial demanded).

[160] The Court recognized that states were not bound to establish an opportunity to appeal convictions in Blackledge. 417 U.S. at 26 n.4.

jury trial. Of the two it would be appropriate to protect jury trial demands with a standard at least as favorable as that applied in appeals, if not one more favorable.

It was also unnecessary for the Court to imply that in all pretrial cases a presumption of vindictiveness is never appropriate. Even if it is reasonable to place the burden of persuasion on the defendant to show vindictive motivation, the practical problems of preparing the prosecutor's case do not support the Court's implied holding that his motives are never vindictive. The footnote in Goodwin to the effect that a prosecutor is presumed not to act from vindictive motives, and only a rare case should be decided for the defendant goes much too far, and places an unjustified burden on a defendant facing harsher charges. A rebuttable presumption of vindictiveness test provides a reasonable approach for resolving allegations of vindictiveness if facts supporting the prosecutor, such as the lack of knowledge about Goodwin's other criminal activities, are given full weight.[161]

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[161] This approach would not have contradicted Bordenkircher, for unlike the facts in that case no mention of a felony charge was made during the plea negotiations between Goodwin's counsel and the Assistant U. S. Attorney. 457 U.S. at 371. In fact, without this crucial fact of notice, Bordenkircher arguably calls for applying a presumption of vindictiveness. See Id. at 385 (Blackmun, J. concurring), 387 (Brennan, Marshall, J. J. dissenting); Note, Fifth Amendment - Prosecutor Not Presumed Vindictive in Pretrial Charge Increases After Defendant's Request for a Jury Trial, 73 J. CRIM. L. & CRIMINOLOGY 1452 (1983); Note, United States v. Goodwin, Enhanced Discretion in the Pretrial Setting, 10 OHIO NORTHERN U. L. REV. 415 (1983); Comment, Unleashing the Prosecutor's Discretion, 20 AM. CRIM. L. REV. 506 (1983) (Goodwin decision should be limited to its facts, and the Supreme Court has sanctioned abuse of the prosecutor's discretion).

VII. Factors for resolving vindictive prosecution claims

Even though the Court has shown that it does not consider presumed vindictiveness a proper standard in pretrial cases, it is not clear that it meant that an absence of vindictiveness will be presumed in every case under any set of facts. Such a reading of Goodwin is inconsistent with their statements that due process protects a defendant against retaliation. But it is clear that in a pretrial case the defendant has the burden of proving that the prosecutor retaliated against him. This places the issue primarily with trial judges, who must balance the competing interests of prosecutors and defendants while weighing the evidence presented.

If a prosecutor has to go through a contested trial to convict a defendant he may well want to make it worth his while. This does not mean he will bring unfounded charges[162] but he will be motivated to find as many charges as possible or to decide that a misdemeanor case now warrants a felony charge. Pressure to keep up with a case load leads prosecutors to a guilty plea.[163] But

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162 "The prosecutor shall file only those charges which he believes can reasonably be substantiated by admissible evidence at trial." NATIONAL PROSECUTION STANDARDS, Standard 9.4 (Nat'l Dist. Atty. Assn. 1979); PRINCIPLES OF FEDERAL PROSECUTION at 5-6. See F. R. Crim. P. 29(a) (A) (judgment of acquittal may be entered if evidence considered insufficient to sustain a conviction). See also, Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. CHI. L. REV. 50,89 (1969) (prosecutors motivated by calendar considerations to move cases and view drafting charges as a technical exercise to gain leverage, not as an equitable task); Thomas, Prosecutorial Decision Making, 13 AM. CRIM. L. REV. 507 (1976) (lists factors used in decision to charge).

163 "[T]he entire criminal justice system comes to depend upon a high rate of guilty pleas. . . . Prosecutor's offices are staffed, court calendars planned,
(Footnote Continued)

fairness to the same defendant should require that at some point his exposure to prison is clearly established. Unlimited freedom to increase the severity of charges against a defendant can lead to unfair coercion by prosecutors. Trial judges have a responsibility to curb such unfair charging decisions.[164] All of these interests now meet at the trial level because judges must decide if the prosecutor increased the severity of the charges to retaliate against a defendant for successfully exercising a procedural or constitutional right.

To do this, they will evaluate the circumstantial evidence surrounding any pretrial increase in the charges, much as trial courts consider circumstantial evidence on other issues.[165] As the issue is only raised if the ante has been upped after exercise of a procedural right, those two facts alone may not be

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(Footnote Continued)
and correctional facilities built in anticipation of these practices." NEWMAN, CONVICTIONS, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 2 (1966). The San Diego United States Attorney's office has a practice of filing a felony and a misdemeanor charge against illegal aliens. It is understood that if the alien pleads guilty to the misdemeanor the felony will be dropped.

164 "[J]udges in practice, commonly assume a responsibility for the functioning of the over-all criminal justice system, rather than limiting their activities to the direct, immediate business of the court." Id. at 36. This has led to their acquitting guilty defendants when they believe police methods have been unfair. Id. at 235-36.

165 The actual vindictiveness test is similar to the one applied when a defendant alleges that double jeopardy bars reprosecution after he requested a mistrial: that the prosecutor intended to provoke him into moving for a mistrial. Oregon v. Kennedy, supra note 154. The majority in Kennedy believed that trial courts could apply that standard: "[A] standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence from objective facts and circumstances is a familiar process in our criminal justice system." Id. at 675. Justice Powell emphasized that trial courts "should rely primarily on the objective facts and circumstances of the particular case." Id. at 678.

sufficient by themselves to prove actual retaliation. A prosecutor may be tempted not to present any evidence, and rest on the argument that the defendant has not met his burden. But the circumstances surrounding filing the harsher charges could persuade an individual judge that the prosecution intended to retaliate. Without any justification offered by the prosecution the trial judge may decide for the defendant, and his decision will stand unless clearly wrong.[166] Even though the burden is on the defendant, prosecutors will be pressured to present evidence to show a lack of retaliatory intent, much as they must do in retrial cases. I suggest that the following factors are pertinent in analyzing vindictive prosecution claims.[167] I do not suggest that these factors

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166 A trial judge's finding of fact is generally upheld on appeal unless clearly erroneous. United States v. Hart, 546 F.2d 798, 801-02 (9th Cir. 1976), cert. denied 429 U.S. 1120 (1977); United States v. Jones, 475 F.2d 723 (5th Cir. 1973); United States v. Conner, 478 F.2d 1320 (7th Cir. 1973). See, 9 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2573 at 686-89. However, judges have rarely interfered with a prosecutor's exercise of discretion. See also, Vorenburg, Decent Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521, 1540-42 (1981).

167 These factors can also be useful to determine whether a defendant will be entitled to a hearing on his motion to dismiss or be entitled to discovery of government documents that bear on the decision to increase the charges. The approach should be similar to that taken where the defendant alleges selective prosecution and bears the burden of proving that others similarly situated have not been prosecuted and that he was selected for prosecution because of his race, religion, or his exercise of constitutional rights. To obtain a hearing the defendant must put forward "some evidence tending to show the existence of the essential elements of the (selective prosecution) defense," and to obtain discovery also show "that the documents in the government's possession would indeed be probative of these elements." United States v. Berrios, 501 F.2d 1207, 1211-12 (2nd Cir. 1974). While a showing that harsher charges followed exercise of a right may not be sufficient of itself to prove vindictiveness, it does make out a prima facie case which could entitle the defendant to a hearing and a possible discovery of documents. But see United States v. Rodriguez, 429 F. Supp. 520, 522 n.1 (S.D.N.Y. 1977) (Assistant U.S. Attorneys should only be required to testify on vindictive prosecution issues in "extraordinary circumstances" and their files are normally immune from discovery).

are constitutionally required. But they are objective and bear the relevant issue of a prosecutor's motivation for bringing harsher charges.

A. Nature of the harsher charges. Has the sentence been increased by substituting a harsher version of the original charges, have unrelated crimes been substituted, or has the defendant now been charged as an habitual offender? If a harsher version has been substituted it is more likely that the increase was vindictively motivated. If charges were added but arise from the same transaction that let to the original charge, the added charges should be considered to be a harsher version of the original charges. If charges from separate incidents have been added it is inappropriate to dismiss them on vindictive prosecution grounds. Because a defendant is on trial for one incident does not mean he has a due process right to be charged at that time with all known charges. Adding an habitual offender allegation that was available prior to the first charging decision indicates vindictiveness.

B. Information known to the prosecutor. Did the prosecutor base the increase on new information learned after the first charges were filed? If so, vindictiveness is clearly not indicated. The real issue here is what information will the prosecutor be considered to know. Are all United States Attorney's offices charged with notice of information held by other offices, and with notice of all information held by law enforcement agencies? Because the motivation of the prosecutor who increased the severity of the charges is the key, actual knowledge should be required, and not an artificial assumption that the prosecutor knows information held by other agencies.

If the prosecutor who brought the original charge did not know of information held by his office that supports the harsher charges, it is not consistent with an actual vindictiveness test to hold him to knowledge of that information. If he later finds out about that information it is new to him and indicates a back of vindictiveness. In practice, this point will be raised by the prosecution. Without any attempt to show new information, the court should proceed on the premise that the information supporting any increase in charges was available when the initial charges were brought.

C. Time and timing. If harsher charges are filed immediately after a defendant successfully exercises a pretrial right, retaliation is more likely. This fact also indicates that the prosecution had the information supporting the harsher charge prior to the defendant exercising the right. A variation on the time harsher charges are filed is the length of time the prosecution has had the case since charges were first filed. If a substantial period of time has elapsed, it is more likely that the prosecution has had sufficient time to evaluate the available information. The longer the first charges remained unchanged before exercise of the right, the more credible is the conclusion that a later increase is not due to closer evaluation, but is due to retaliation.

If the increase follows unsuccessful plea negotiations, and the defendant was not told that he would face the harsher charges during negotiations, vindictiveness is more likely. While Bordenkircher would control had the defendant been given notice, it does not (and should not) insulate the prosecutor from examination of his motives when notice is not given.

D. Effect of the defendant's exercise of a right. The more difficult the defendant has made the case for the prosecutor, the more likely he would retaliate against the defendant. For instance, a cross-country shift in a trial is more of a burden on a prosecutor's office than a short continuance. The hard issue here is how to treat a demand for a jury trial. The majority in Goodwin did not think jury trials put much of a strain on prosecutors, and they are probably correct on that point. But the forum, judge or jury, is only one part of a contested case. What is important is that when the defendant contests the case he increases the burden on the prosecutor by forcing him to run the risk of a trial and increases the burden still further by demanding a jury trial. Demand for a jury trial is of some weight and should be considered with other evidence that the prosecution had to devote extra effort in prosecuting the case, such as bringing in witnesses from long distance for the trial.

E. Procedures and policies in the prosecutor's office. In many cases the defendant's case file may start with an inexperienced prosecutor at the preliminary stage of a case and move to a more experienced trial attorney as the case gets closer to trial. Should the fact that a subsequent prosecutor on the case decided to increase the severity of the charges go toward showing a lack of vindictiveness? A subsequent prosecutor will probably have his own view on which charges to bring,[168] and should have the independence to reassess the case against the defendant. But he will also be affected by the institutional pressure to discourage defendants from aggressively attacking the government's

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168 See Hardwick v. Doolittle, supra note 74 (vindictiveness could be rebutted by showing "a different approach . . . by a successor prosecutor").

case. The fact that it was a new prosecutor who upped the ante by itself should not negate any inference of vindictiveness.

What if the subsequent prosecutor says that the prosecutor who brought the first charges made a mistake, and he brought the harsher charges to correct that error?[169] If an oversight is the reason lesser charges were brought initially, fairness to a defendant should not require that the prosecutor lose valid charges simply for that reason. On the other hand, while this fact shows a lack of intent to retaliate, a court should be reluctant to accept at face value a claim of mistake. A clear showing that an oversight occurred should be required. For instance, if the defendant is only charged with assault instead of homicide when the victim's death is known from the outset, the less persuasive the claim that homicide was not charged because the first prosecutor made a mistake.

If the prosecutor's office has a policy of filing the most serious charges from the outset, but in this case did not follow that policy, the inference of retaliation is stronger.[170] The courts are not in the business of requiring

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169 The courts have split on whether mistake is a valid justification for increasing the charges. The Fifth Circuit would accept mistake. Id. The Ninth Circuit and Sixth Circuit would not. United States v. Ruesga-Martinez, 543 F.2d 1367, 1730 (9th Cir. 1976); United States v. Andrews, 633 F.2d 449, 456 (6th Cir. 1980) (but inexperience could be considered to rebut vindictiveness).

170 "Except as hereinafter provided, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction." PRINCIPLES OF FEDERAL PROSECUTION at 16. This is also the policy of the Cook County District Attorney's office.

prosecutors to adhere to their own office policies, but the fact that they were not followed in a particular case is an important consideration in deciding whether the prosecutor retaliated or not. An objection to this view that can be raised is that prosecutors would be reluctant to establish policies to avoid having them used against them. But policies are established for reasons other than concern about the effect a failure to follow them might have on a particular case. Also, not following such a policy is only one factor a court should consider, and I do not suggest defendants should be given any right to compel enforcement of office policy.

G. Statements by the prosecutor. If the prosecutor said anything that connects the harsher charges with the defendant's exercise of a right, retaliation is indicated. For instance a threat to seek a felony indictment if a case is not promptly tried indicates that the harsher charges were brought to retaliate after a continuance request. The issue is the intent or motivation of the prosecutor, and his statements are obviously important in determining why the severity of the charges were increased.

The advantage in examining these factors is that they are relevant to the issue of whether an actual motive to retaliate led to the increased charges, and they are reasonably objective enough for a court to use. They allow defense counsel a reasonable opportunity to show vindictiveness which should prevent a perception that prosecutors can act vindictively prior to trial. At the same time, the defense must carry the burden and prosecutors are entitled to show factors that negate an inference of vindictiveness. Successful motions will be

based on a factual conclusion, rather than an artificial presumption that does not adequately address the facts in an individual case.

At the same time these factors are not without weaknesses. While they are reasonably objective they do not lead to a particular conclusion by themselves. They must be weighed by individual judges who may be influenced by their own experiences and views. The necessity that a judge draw conclusions from these factors will lead to different results in cases raising very similar facts. Without a definite standard prosecutors will not know what actions to avoid, and defense counsel will not know which case merits an attack and which does not.

For example, while the way in which the charges were increased will be clear, the judge must still decide how one type of increase indicates retaliation more than another. Substituting a felony for a misdemeanor which increases the sentence from one year to five years may be considered more indicative than when an additional felony charge was added that increased the maximum from five years to ten. In the first case the potential sentence was increased five-fold, versus doubling the maximum in the second. But the actual increase was only four years in the first case, and was five years in the second.

Information known to the prosecutor also mixes objective facts and subjective analysis. A judge may agree that the information was in fact new, and that the prosecutor was justifiably unaware of the information. But he may not agree that the information provides a reasonable basis for the increase. For example, he may accept that the prosecution discovered a previous

misdemeanor conviction, but may not be impressed if the defendant was initially charged with a series of felonies.

Judges will have to decide whether the timing of the increase indicates retaliation. Does an increase one day after a successful suppression motion show vindictiveness more clearly than an increase one week later? Probably, but what about an increase two weeks after the motion, or one month?

Judges may differ in their perception of the difficulty caused by the exercise of a right. The Supreme Court was not unanimous on the burden caused by a jury trial, and trial judges will have different views on whether a jury trial demand indicates vindictiveness more than exercise of other rights.

The same problem exists when a prosecutor's office procedures are raised. Judges will be evaluating the reasonableness of a new charging decision by a successor prosecutor and the reasonableness of any claim of a mistake in the first decision. An additional problem is raised with any policy regarding the first charges. This creates pressure on prosecutors not to have a policy of bringing the most serious charges from the outset. But a particular judge may believe such a policy is the better practice and that the absence of that policy makes increases more, not less, suspect. This puts prosecutors who want to establish a policy in a quandary.

Evaluating any statements made by a prosecutor places him in a dilemma. If he tells the defendant that an increase is possible, his words may be used against him, even if he considered that fairness called for him to be candid.

But if he says nothing, his silence about a known and contemplated increase still can allow the inference of retaliation. It is very hard for a prosecutor to walk this line, and equally hard for a judge to interpret the meaning behind his words. For instance, if a prosecutor said to a defendant's counsel, "Look, I have to tell you that another robbery charge might be brought if we have to go to trial on this," isn't he connecting the increase with exercise of a right as much as if he had said "If you insist on a trial we will file on this other robbery"?

The problems and weaknesses with deciding vindictive prosecution issues on the actual motivation of the prosecutor that I have described are not caused by the factors I have suggested. They are an inevitable result of the actual vindictiveness test. The potential for disparate results in similar cases, exposure of prosecution files to discovery, lack of precise guidelines, and evaluation by judges of the reasonableness of prosecutors' decisions is caused by this standard, not by the objective factors that should be used.

VIII. Comparison of the results in United States v. DeMarco

A. The DeMarco decision.[171] In 1975 Mr. DeMarco was facing charges in Washington D.C. arising from the preparation of President Nixon's 1969 income tax return. He successfully obtained a change of venue to California.[172] The prosecutors opposed the change of venue and informed DeMarco's lawyers that if venue was transferred, an additional charge would be filed by the California office. After the change of venue the United States Attorney's office in California filed the additional charge.[173] At trial, the district court dismissed the additional charge as vindictively motivated, relying in part on a presumption of vindictiveness raised by the above facts,[174] and the Ninth Circuit affirmed.

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171 United States v. DeMarco, 550 F.2d 1224 (9th Cir.), cert. denied 434 U.S. 827 (1977).

172 DeMarco was charged with conspiracy to defraud the United States, making false statements to the IRS in Washington D.C., and obstructing justice. His co-defendant also moved to change venue to Chicago. Id. at 1226.

173 The added charge alleged false statements made to an IRS agent in California in 1974. Id.

174 United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal. 1975). There were two grounds for the district court's dismissal of the California charge. The first was that both Blackledge and a court's inherent supervisory authority over the administration of justice prohibited threats designed to deter exercise of a right. Id. at 512. The second was that the prosecution did not disclose to the grand jury that an attack on that charge could be made, which denied the grand jury material information. Id. at 513. The Ninth Circuit did not address this second reason for dismissing the California charge. 550 F.2d at 1275.

B. The decision under Goodwin. As a pretrial right to a change of venue was exercised, DeMarco would have the burden of proving an actual intent to retaliate. If the Supreme Court's footnote in Goodwin is to be taken at face value he must also overcome the presumption that the prosecutor did not intend to retaliate. Even considering the threats made by the prosecutors, if this presumption really exists, DeMarco could fail to meet that additional burden. This result is unsatisfactory because the connection between the additional charge and the venue change is clear, and reliance on an artificial presumption does not allow full examination of all the facts in the case.

C. DeMarco analyzed under the suggested factors.

1. Nature of the harsher charges. The maximum sentence was increased by adding a separate charge based on acts committed in California. This was not a case where a harsher variation of the original charges was filed, which negates vindictiveness.

2. Information known to the prosecutor. Although the California charge was from a separate transaction, the facts surrounding that charge were known to the first prosecutors prior to the transfer of the case. As the charge was not based on new information, vindictiveness is indicated.

3. Time and timing. The timing does not show or disprove vindictiveness. The additional charge would not have been brought until the case was transferred to California. But as an indictment was obtained from a grand jury and the

Washington D.C. prosecutors knew of the California incident, there was no new review of the facts, which indicates vindictiveness.

4. Effect of the venue change. The case was transferred from one side of the country to another for trial. This must have had a major impact on the prosecution, which indicates the California charge was brought to retaliate.

5. Policy of the United States Attorney's office. The California office did not bring the additional charge from the outset because of a policy against simultaneous prosecutions. Once the case was transferred, that policy no longer applied. Such an approach is beneficial to a defendant, removing the strain and expense of defending himself against multiple prosecutions in different parts of the country, and tends to negate vindictiveness.

6. Statements by the prosecutor. This is the key fact in the case. The Washington D.C. prosecutor warned the defendant that he would face harsher charges if he changed venue.[175] Also, the same prosecutors opposed the venue change. These warnings are the clearest indication that the California charge was brought to retaliate for the change in venue.

Under this approach DeMarco should be able to establish actual retaliation. The question now becomes how could a prosecutor avoid losing an additional

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[175] The district court judge agreed with the government that the tone of the conversations was not threatening, but held that the "substance surely was." 401 F. Supp. at 508.

charge in a similar case. Without the threats to add the additional charge, the facts in DeMarco actually favor the prosecution. The venue change removed the policy against simultaneous prosecutions which would explain why the California charge was not brought from the outset. The lesson is that if prosecutors want to join unrelated charges they should not threaten to add or modify charges to talk a defendant out of exercising a pretrial right. One problem with focusing on the prosecutor's statements is that the prosecutor who is genuinely trying to tell the defense what they face may inadvertently create the impression he is threatening to retaliate. A prosecutor should be able to candidly tell the defense what they are facing without fear that he is helping establish a vindictiveness claim. The question is not simply whether the prosecutor raised the specter of a harsher sentence, but did he connect the harsher sentence to giving up some right.

Is this approach better than following the Goodwin presumed lack of vindictiveness? I think so. In cases like DeMarco it allows a more reasoned analysis of the facts and opposing interests in each case, and addresses the problem the prosecution faced with the policy against simultaneous prosecutions. Neither the Ninth Circuit's decision nor a rigid application of Goodwin really tell prosecutors or defense counsel what to expect under similar facts.

IX. Summary/Conclusion

The basic notion that due process protects a defendant from retaliation after he exercises a right remains after the Goodwin decision. Before a vindictive prosecution claim can be raised at all, the defendant must first exercise a constitutional or statutory right and then the prosecutor must change his charging decision in a manner that exposes the defendant to a harsher sentence. What has been changed is the standard for deciding a vindictive prosecution claim once the defense has shown that the increase followed exercise of a right.

If a defendant is tried after a successful appeal or trial de novo, the prosecution has the burden of rebutting presumed vindictiveness. Pearce, Blackledge, and Goodwin show that the Supreme Court is primarily concerned with protecting an individual after he appeals or collaterally attacks his conviction. Even though they have insisted that double jeopardy has nothing to do with the due process protection against retaliation by the prosecutor, their decisions protect the same values. When a defendant is tried on harsher federal charges arising from an incident that led to trial by a state, the retrial presumption is not applicable. The presumption of vindictiveness may be rebutted by the prosecution. The prosecution has to show objective evidence that establishes a non-vindictive reason for the increase. The evidence that will be most likely to succeed is a showing that new information was discovered after the first trial.

The defendant faces a heavier burden when harsher charges are brought after he exercises a right prior to trial. He must do more than raise the appearance of retaliation but must prove that the prosecutor retaliated against him because he exercised that right. In Goodwin the Supreme Court implied that he also must overcome a presumption that a prosecutor did not intend to retaliate against him.

If plea bargaining is involved, the defendant will not prevail even if he can show the harsher charges were brought because he insisted on pleading not guilty. Plea bargaining negotiations are excepted from the vindictiveness concept. The prosecution may freely threaten harsher charges to induce a defendant to give up his right to contest the case against him, and if the defendant does not plead guilty, bring the harsher charges. If the defendant has his bargained-for guilty plea later set aside, the prosecution may re-file the original charges and should be allowed to file any harsher charges that were a part of the plea negotiations. But I suggest that a presumption of vindictiveness should arise if the prosecution adds charges that were not disclosed during the plea negotiations prior to the first trial.

Mistrials should be treated as allowing a presumption of vindictiveness when harsher charges are brought after a defendant successfully moves for a mistrial. The language in Goodwin supports this conclusion, and the cases that have dealt with the issue since that decision have applied a presumption of vindictiveness. The rationale for the presumption, the institutional bias against retrying a settled question, does not really apply after a mistrial for there has not been a verdict. But because the prosecution has had an

opportunity to finalize and prepare its case, and elected to go forward to trial on the charges, a realistic likelihood exists that an increase in their severity is vindictively motivated.

The defendant raises vindictive prosecution by moving to dismiss the harsher charges; re-sentencing on the lesser charges is not the remedy. Habeas corpus relief from a state court conviction can be obtained in federal courts, and a plea of guilty does not bar a defendant from raising the issue on appeal.[176] If the defendant's motion to dismiss is denied in a federal prosecution he cannot take an interlocutory appeal of that denial.[177] However, the prosecution can appeal a district court decision in favor of the defendant.[178]

Defense counsel trying to establish pretrial vindictiveness prior to the initial trial will attempt to show that the prosecutor intended to retaliate

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176 See Blackledge v. Perry, 417 U.S. at 30-31; Journigan v. Duffy, 552 F.2d 283 (9th Cir. 1977).

177 In United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982), decided ten days after Goodwin the Court held that denial of a motion to dismiss is not immediately appealable under 28 U.S.C.A. § 1291 (supp. 1983), or the "collateral order" exception of Cohen v. Beneficial Industrial Corp., 337 U.S. 54 (1949). The Ninth Circuit reversed charges filed after the defendant changed venue from Kentucky to California. United States v. Hollywood Motor Car Co., 646 F.2d 378 (9th Cir. 1981) Previously the Ninth Circuit had allowed interlocutory appeals, United States v. Griffin, 617 F.2d 1342 (9th Cir,), cert. denied 449 U.S. 863 (1980), while two other federal circuits had not. United States v. Brizendine, 659 F.2d 215 (D.C. Cir. 1981); United States v. Gregory, 656 F.2d 1132 (5th Cir. 1981). The defendant must exhaust state remedies before a habeas corpus petition can be heard. Lowrey v. Estelle, 696 F.2d 333 (5th Cir. 1983).

178 18 U.S.C.A. § 3731 (1184 Supp.) (federal prosecutor may appeal district court's dismissal of count in indictment or information unless further prosecution precluded by double jeopardy).

against the defendant offering by circumstantial evidence. The factors suggested in this paper, i.e., nature of the charges, information known to the prosecutor at the outset, timing, effect of a defendant's exercise of the right, office policy and procedures, and statements by the prosecutor, are relevant in determining the presence of or lack of such motivation.

Successful vindictive prosecution claims brought prior to trial will probably decrease as a result of Goodwin. The burden of proving actual retaliation will be impossible to meet in many cases. But the defense still has the opportunity to establish actual vindictiveness, and if the trial judge is persuaded, that factual conclusion should be upheld on appeal. Trial courts now have the primary responsibility to inquire into the acts and intentions of prosecutors and face the uncomfortable task of weighing any denial of vindictive motivation against the circumstances surrounding their increasing the severity of the charges after a defendant has exercised a pretrial right. The problems that arise, i.e., potential discovery, potential for wildly different decisions, and potential problems prosecutors face in deciding whether to establish a policy on bringing the most severe known charge from the outset or to inform the defense about a possible increase in the charges, all result from the requirement that courts decide the prosecutor's actual motivation. They do not result from the suggested factors.

Prosecutors should avoid creating the impression they have retaliated against a defendant because the trial judge may consider that the objective facts and circumstances outweigh a denial of vindictive motivation. There is another reason for prosecutors not to assume Goodwin has shut off successful

pretrial vindictiveness claims. The Supreme Court has not been consistent in this area. Although the Court has provided more protection against vindictiveness to defendants who have been convicted, in Goodwin the Court said it was only being "cautious before (adopting) an inflexible presumption of prosecutorial vindictiveness in a pretrial setting."[179] The pretrial standard of actual vindictiveness currently favors the prosecutor. But the Court might re-examine that standard if prosecutors do not avoid "upping the ante."[180]

Franklin L. Nolta

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[179] 457 U.S. at 381. In Pearce the Court noted that "data have been collected to show that increased sentences on reconviction are far from rare", citing one law review note and a letter from an inmate. 395 U.S. at 669 n.20. The reported cases document that it is not "rare" for a defendant to face harsher charges if he insists on pleading not guilty, demands a jury trial, or exercises other pretrial rights. Given the right case, the Court could conclude that a presumption of vindictiveness standard should apply to pretrial cases. See Holderman, Preindictment Prosecutorial Conduct in the Federal System, 71 J. CRIM. L. & CRIMINOLOGY 1,30 (1980) (suggesting that federal prosecutors should carefully follow policies to avoid courts mandating they be followed or charge will be dismissed); Vorenburg, Narrowing the Discretion of Criminal Justice Officials, 4 DUKE L. J. 651, 666-80 (1976) (criticizing the unreviewable discretion to charge as serving no valid purpose and resulting from default); Note, Two Models of Prosecutorial Vindictiveness, 17 GEO L. REV. 467, 506 (1983) (arguing that the Court made the distinction between pretrial and posttrial in Goodwin to avoid overturning Blackledge or Bordenkircher).

[180] While the Court could change the standard to apply in pretrial cases, I think that is unlikely unless it is faced with an outrageous case. Four justices (Berger, Rehnquist, White, O'Connor) said in Wasman v. United States, 82 L.Ed 2d 424 (1984) that Pearce only protected a defendant from actual vindictiveness by the sentencing judge. Because Pearce is the foundation for the Blackledge and the retrial presumption, it appears that those justices would support an actual vindictiveness standard in retrial as well as pretrial cases. But in Thigpen v. Roberts, 82 L.Ed.2d 23 (1984), decided six days before Wasman, the majority (including justices White and Berger) made no mention of an actual vindictiveness standard, and decided the issue as a straightforward application of Blackledge and the Goodwin presumption.

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